TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 9

THOMAS C. ROWLEY, AS TREASURER OF CONVERSE COUNTY, STATE OF WYOMING, ET AL., ETC., PETITIONERS,

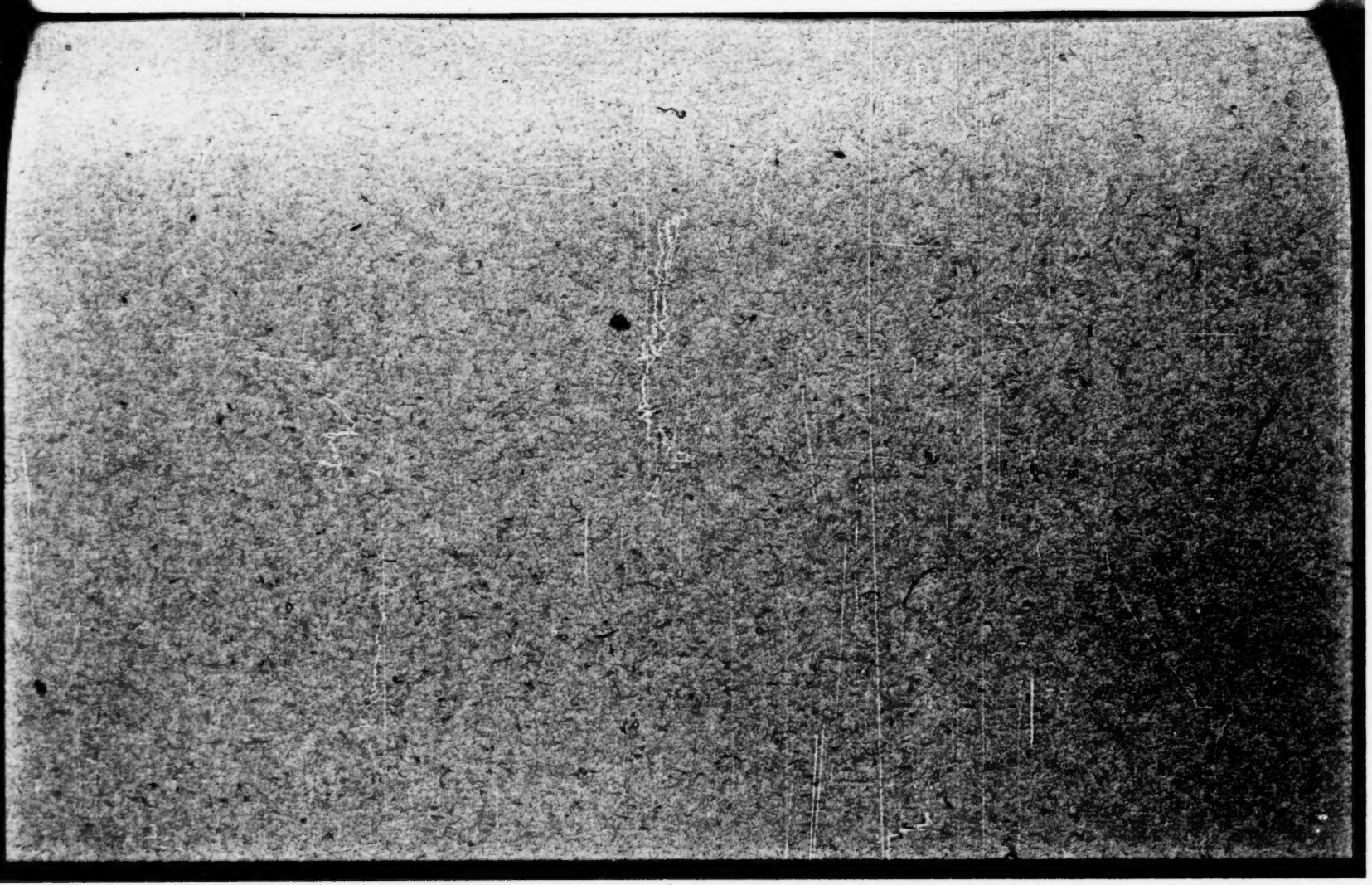
vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 24, 1934

CERTIORARI GRANTED APRIL 30, 1934



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[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF WYOMING

Civil. No. 2175

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

THOMAS C. ROWLEY, as Treasurer of Converse County, State of Wyoming, et al., Defendants

BILL IN EQUITY—Filed Nov. 7, 1931

Comes now the plaintiff, and for cause of action against the defendants, and each of them, says:

1. Plaintiff is now, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws, and a citizen, of the State of Illinois.

2. Defendant Thomas C. Rowley is, and throughout the [fol. 2] year of 1931 was, the duly elected, qualified and acting treasurer of the County of Converse, in the State of Wyoming, and is a bona fide resident and citizen of said Converse County, State of Wyoming.

3. Defendant Charles T. Cole is, and throughout the year of 1931 was, the duly elected, qualified and acting treasurer of the County of Fremont, in the State of Wyoming, and is a bona fide resident and citizen of said Fremont County, State of Wyoming.

4. Defendant Alta Pearl Massee, is, and throughout the year of 1931 was, the duly elected, qualified and acting treasurer of the County of Natrona, in the State of Wyoming, and is a bona fide resident and citizen of said Natrona County, State of Wyoming.

5. Defendant D. A. Shoopman is the duly appointed, qualified and acting treasurer of the County of Niobrara, in

the State of Wyoming and is a bona fide resident and citizen of said Niobrara County, State of Wyoming.

6. The amount involved in this suit, exclusive of costs and interest, exceeds the sum of Three Thousand Dollars ($3,000.00) as to each of the defendants herein named, and this suit is a controversy wholly between the citizens of different states.

7. This suit involves the construction of the Fourteenth Amendment to the Constitution of the United States, in which it is provided that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor shall any state deny to any person within its jurisdiction the equal protection of the law, and of Section 8 of Article 1 of said Constitution empowering Congress to regulate commerce among the several states; and this plaintiff claims the protection of the provisions of the said Constitution against the unlawful acts of the defendants as hereinafter set forth.

8. This suit is a suit in equity to enjoin the collection by defendants from the plaintiff of illegal taxes, such illegality arising out of the fact that, while the property of plaintiff is valued and assessed in the State of Wyoming at a figure greatly in excess of its actual value, all other property in [fol. 3] the state is valued and assessed at not more than 60% of its actual value, and there results therefrom an unlawful discrimination against the plaintiff.

9. Prior to the first Monday in June, 1931, plaintiff made out its return, containing a sworn statement and schedule of all its property, containing all the data and information required to be therein contained by the provisions of Chapter 57, of the Session Laws of the State of Wyoming for the year 1923, and filed the same in the office of the Wyoming State Board of Equalization.

10. Thereafter, the said Board of Equalization found the value of plaintiffs' property in the State of Wyoming to be $7,989,587.00, and thereupon, and before certifying the valuation and assessment so made by it to the county assessors of the several counties in which plaintiff's property is located, duly notified the plaintiff of the aforesaid

valuation and assessment made by it, and fixed the 9th day of July, 1931, as the day upon which the plaintiff might appear before said board and present its objections to such valuation and assessment, and for hearing on the same.

11. On the said 9th day of July, 1931, a hearing was had before the said State Board of Equalization upon objections presented by the plaintiff, and thereafter and on the 14th day of July, 1931, the said State Board of Equalization, by resolution fixed the valuation of the property of the plaintiff in the State of Wyoming, at the sum of $7,881,003.94, which said sum is $2,031,433.94, in excess of the actual value of said property. And plaintiff says that, although it has each year during the past five years, protested such action on the part of said State Board of Equalization, the said board has each of said years valued the property of the plaintiff at a figure more than two million dollars in excess of the value of said property.

12. Plaintiff says that it owns and operates a system of railroads with lines extending into and through the States of Illinois, Michigan, Wisconsin, Minnesota, Iowa, Nebraska, North Dakota, South Dakota and Wyoming; that it owns and operates 278.35 miles of main track in the State of Wyoming, and 8,180.20 miles of main track in the other states mentioned; that the miles of main track belonging to the plaintiff in the State of Wyoming are less than one-half of the value per mile of its miles of main track located outside the State of Wyoming, and that while it has no [fol. 4] switching or terminal facilities or other property aside from its main track of any considerable value used in its railroad operations located in the State of Wyoming, it has, owns and operates in connection with its system in other states, elevated tracks, elevators, shops, terminal facilities, double main line tracks, ore docks, railway stations and other equipment of great value, and that the value of the plaintiff's property used in its railway operations and located outside the State of Wyoming is more than twice the value per mile of road of its said property so used and located in the State of Wyoming, all which facts as herein set out were at all times herein mentioned, and particularly on the 14th day of July, 1931, well and fully known to all the members of the Wyoming State Board of Equalization.

Plaintiff says that the said State Board of Equalization, having properly determined the entire railway system of the plaintiff, used in its railroad operations, to be of the value of $375,285,902.00, in fixing the value of that portion of its said property located within the State of Wyoming and subject to valuation by the said board, took and accepted as a factor the percentage of plaintiff's main line track located within said state of the total miles of its main line track located in and outside said state, to-wit: 3.29%, and in so doing arbitrarily and unlawfully, failed and neglected to take into account the fact, as hereinbefore set out, and well known to said board, that the value of plaintiff's property in the State of Wyoming, measured by the number of miles of main line track in said state, is less than one-half the value of its property located in states other than the State of Wyoming so measured. And plaintiff says that by the said arbitrary method, and by arbitrarily and wrongfully using the plaintiff's net operating revenue, instead of its gross operating revenue, as a factor in fixing the value of plaintiff's property in the State of Wyoming, its valuation was, by said board, arbitrarily, fraudulently and unlawfully fixed at a sum approximately two million dollars in excess of the actual value of said property.

13. Plaintiff says that for several years last past and particularly in the year 1931, the said State Board of Equalization unlawfully, arbitrarily, knowingly and intentionally valued plaintiff's property for taxation purposes in the [fol. 5] State of Wyoming at about 33⅓% in excess of the actual value thereof.

14. For more than ten years last past, it has been the common and universal practice of the county assessors of all the counties of the State of Wyoming, purposely, intentionally and systematically to place a valuation for taxation purposes upon the property generally of the taxpayers of the said state, not including this plaintiff, greatly less than the actual and proper value of said property; that in the years 1919 and 1920, such property so assessed by the said county assessors was valued at from ten to fifty per centum of the actual value thereof, and that in the year 1931, the property generally in the State of Wyoming, assessed by the county assessors of said state, and not including the property of the plaintiff, was intentionally

valued by said county assessors for taxation purposes at not exceeding sixty per centum of the actual value thereof; that for years last past, and including the year 1931, the said county assessors, with the knowledge and consent of the State Board of Equalization, have knowingly and intentionally omitted entirely from the assessment rolls certain classes of property legally taxable and not exempt under the statutes of said state, amounting in value to the sum of approximately one-fifth of the total assessed valuation of all the property of said state; that said undervaluation of property by the said county assessors, and said omission by them of property from the assessment rolls, has been made and is being made by said county assessors, systematically, notoriously, unlawfully, intentionally, and with the knowledge and approval of the State Board of Equalization, and for the purpose of unlawfully requiring and compelling the plaintiff to pay taxes greatly in excess of the amount of taxes justly and legally due from it, and that the valuation and assessment of the property of the plaintiff by the said State Board of Equalization at amounts in excess of the actual value of said property, and the systematic and intentional undervaluation by the county assessors of all the property located in the State of Wyoming subject to assessment by the said county assessors, has operated and does operate fraudulently to discriminate against the plaintiff in violation of its rights under the Fourteenth Amendment to the Constitution of the United States.

[fol. 6] Plaintiff further says that in fixing a valuation and assessment for tax purposes upon plaintiff's property in excess of the actual value thereof, and in valuing property generally throughout the State of Wyoming other than that of the plaintiff, at not more than 60% of its value, the said State Board of Equalization and the county assessors of the counties in which property of the plaintiff in the State of Wyoming is located, acted arbitrarily, and with the fraudulent intent and purpose to place upon the plaintiff, and have placed upon the plaintiff, more than its just share of the taxes of said state, and to discriminate, and have discriminated, against the plaintiff, in violation of the rights of the plaintiff under the provisions of the Constitution of the State of Wyoming and the Constitution of the United States.

15. Plaintiff says that said State Board of Equalization has certified the aforesaid unlawful valuation of $7,881,-003.94 to the county assessors, and apportioned the same to the counties in which plaintiff's property is located as follows:

To Converse County	$2,017,039.00;
To Fremont County	$2,176,159.00;
To Natrona County	$2,416,539.00; and
To Niobrara County	$1,271.267.00;

and that the said respective valuations have been by the assessors of said counties spread upon the tax assessment rolls of said respective counties and by them certified to the defendants County Treasurers for collection; that the defendants claim and unless restrained by order of this court, will collect from, and compel the plaintiff to pay, in taxes upon the aforesaid unlawful valuations the following amounts:

To Converse County	$40,042.27
To Fremont County	$48,223.02
To Natrona County	$47,701.82
To Niobrara County	$32,639.01

That under the statutes of the State of Wyoming, one-half of plaintiff's taxes will become delinquent on the 10th day of November, 1931, and one-half on the 10th day of May, 1932, provided that if no part thereof shall be paid before the said 10th day of November, 1931, the whole thereof will become delinquent on the first day of January, 1932, and said taxes will draw interest after the same be-[fol. 7] come delinquent at the rate of 15% per annum; and if said taxes are not paid, plaintiff's property will be distrained and sold to collect the same. And plaintiff says that the aforesaid taxes constitute a lien upon plaintiff's property located in the said counties, and a cloud upon plaintiff's title to the same, and that they will seriously interfere with the efforts and ability of the plaintiff to finance its operations and carry on its business as a common carrier of interstate commerce.

16. Plaintiff says that it has no plain, speedy and adequate remedy at law, and that unless the injunction prayed for is granted by this Court, the unlawful acts herein com-

plained of will result in great and irreparable loss to the plaintiff.

17. Plaintiff says that the actual value of its property in Wyoming, subject to valuation and assessment by the State Board of Equalization is $5,849,570.00, and no more; that in order to make the valuation on plaintiff's property uniform with that placed on property in said state generally, as aforesaid, its property ought to be valued at not more than $3,509,742.00, apportioned to the several counties as provided by law, and plaintiff says that it admits that taxes for the year 1931 are properly assessable upon its property in the amounts and by the counties following, and no more, that is to say:

Converse County	$24,025.37
Fremont County	$28,933.81
Natrona County	$28,621.09
Niobrara County	$19,583.41

that one-half of each of said amounts has become due and payable; that it is now and always has been willing to do justice and to pay all taxes legally chargeable to it; that it has tendered and offered to pay to the respective defendants the full amount now due and payable, and admitted by plaintiff to be due and payable, that is to say:

To defendant treasurer of Converse County	$12,012.69
To defendant treasurer of Fremont County	$14,466.91
To defendant treasurer of Natrona County	$14,310.55
To defendant treasurer of Niobrara County	$9,791.71

and that it is ready and willing to pay such other amounts, if any, as and when the court shall determine the same to be due and payable.

[fol. 8] Wherefore, plaintiff prays that a temporary injunction may be granted and issued against the defendants, and each of them, restraining and enjoining them from collecting, or attempting to collect, from the plaintiff, by distraint or otherwise, any sum of money in taxes above the amount herein admitted to be lawful and just, and that upon hearing and trial said temporary injunction be made permanent; that upon presentation of this bill the court fix an amount which the defendant ought forthwith to pay to each of the defendants pending the final determination of

this cause; for its costs herein to be taxed, and for such other and further relief as to the court may seem just and equitable.

Chicago and North Western Railway Company, a Corporation, Plaintiff, by R. R. Rose, Vincent Mulvaney, Wilfrid O'Leary, Samuel H. Cady, Its Attorneys.

Duly sworn to by Wilfrid O'Leary. Jurat omitted in printing.

In United States District Court

Temporary Restraining Order—Filed Nov. 7, 1931

The above entitled matter coming on for hearing exparte this 7 day of November, 1931, upon plaintiff's bill in equity, and the application for a restraining order therein contained, and upon affidavits supporting the allegations [fol. 9] contained in said bill, and it appearing to the court that plaintiff claims that taxes have been levied against its property in the several counties mentioned in plaintiff's bill in equity in excess of the amounts admitted by it to be due; that it has made a tender to the several defendants of the taxes admitted by it to be due; that under the laws of the State of Wyoming, taxes become delinquent on the 10th day of November of each year; that if no payment of taxes is made by the defendant on or before the 10th day of the present month, except by order of the court its taxes will become delinquent and severe statutory penalties will be imposed; that delinquent taxes constitute a lien upon taxpayers' property under the statutes of said state; that plaintiff is willing to pay the first installment of the taxes upon its property which it admits and believes to be proper; that there is not sufficient time after the filing of the above entitled suit and before the date upon which taxes in said state become delinquent to give notice to the defendants of a hearing on plaintiff's application for a restraining order, and that irreparable loss and damage will be sustained by the plaintiff unless an order is issued restraining the defendants from collecting, or attempting to collect, from the plaintiff its taxes in excess of the amount tendered; and it appearing upon the face of plaintiff's bill in equity, that the defendants, unless restrained by order of the court, will

proceed immediately after the 10th day of the present month to collect from the plaintiff, taxes in excess of the amount admitted by it, and appearing on the face of its bill to be proper; and it appearing to the court that the best interests of plaintiff and defendants require that a restraining order be issued, and that whatever loss or damages may be sustained by the defendants by reason of such restraining order, if any there be, can and will be covered by the bond hereinafter provided for; and it further appearing to the court upon the allegations of plaintiff's bill, the same being positively verified, and upon the affidavits submitted in support thereof, that the plaintiff admits that there is due on its first installment of taxes to the County of Converse the sum of $12,012.69, and to the County of Fremont, the sum of $14,466.91, and to the County of Natrona, the sum of $14,310.55, and to the County of Niobrara the sum of $9,791.71, which said sums have been tendered to the respective county treasurers of said counties respectively, and that said amounts are the amounts [fol. 10] which the plaintiff should forthwith and pending the final determination of the issues presented in plaintiff's said bill, pay to said county treasurers respectively:

Now, Therefore, It Is Ordered That plaintiff forthwith pay to the Treasurer of Converse County the sum of $12,012.69, and to the Treasurer of Fremont County, the sum of $14,466.91, and to the Treasurer of Natrona County, the sum of $14,310.55, and to the Treasurer of Niobrara County, the sum of $9,791.71, to be applied on the first installment of taxes which shall be determined by the court to have been properly assessed and unpaid on the property of the plaintiff in said counties respectively.

And It Is Further Ordered that said defendants, and each of them be, and they are hereby restrained until the further order of the court, from collecting, or attempting to collect, from the plaintiff, or out of its property, or any thereof, any sum or sums of money in excess of the respective amounts herein ordered to be paid by the plaintiff to the defendants,

And It Is Further Ordered that plaintiff forthwith file in the office of the clerk of this court its surety bond in the sum of $3,000.00 to each of the defendants, conditioned upon the payment of such costs and damages as may be incurred or suffered by such defendants in the event it be

found by the court that this restraining order shall have been wrongfully issued, and that said defendants shall have been by this order wrongfully restrained,

And It Is Further Ordered that this restraining shall expire within ten days from the date hereof unless within said time the same is extended for good cause shown, or upon stipulation of the parties,

And It Is Further Ordered that this cause be and the same is hereby set down for hearing upon plaintiff's application for a temporary injunction on the 16 day of November, 1931, at 10 o'clock in the forenoon of said day.

Done in Open Court at Cheyenne, Wyoming, this 7 day of November, 1931.

By the Court.

T. Blake Kennedy, Judge.

[fol. 11] In United States District Court

Order for Temporary Injunction—Filed Dec. 28, 1931

The above matter came on upon notice to all the defendants for hearing upon plaintiff's application for a temporary injunction, and upon defendants' motion to dismiss on the 28th day of December, 1931, the plaintiff's application for a temporary injunction being submitted on its verified bill of complint and affidavits attached thereto, and the affidavits of T. W. Jaycox and R. A. Miller, and no testimony being submitted on behalf of the defendants, and arguments being heard on said motion, and in opposition thereto, and in support of plaintiff's application for a temporary injunction, and in opposition thereto, and the court being fully advised, and it appearing to the court upon the showing made that taxes have been levied against the property of the plaintiff in the several counties mentioned in plaintiff's bill of complaint in excess of the amounts which should properly be levied against said property; that the plaintiff in its bill admitted certain amounts to be due and owing from it to the four defendants, respectively; and that the plaintiff, under order of the court issued upon the filing of its bill, has paid to the said defendants the amounts admitted by it to be due and owing and ordered by the court to be paid; that the taxes

levied upon plaintiff's property constitute a lien upon the same; that unless restrained by order of the court the defendants will proceed to collect from the plaintiff all taxes claimed by them to be due from the plaintiff, the said taxes appearing upon the showing made to be greatly in excess of the amounts due; and that unless enjoined from the collection of said taxes until final disposition of this cause irreparable loss and damage will be sustained by the plaintiff;

Now, Therefore, It Is Ordered, That the defendants and each of them be, and each of them are, temporarily, and until further order of the court enjoined from collecting, or attempting to collect, from the plaintiff any taxes in excess of the amounts admitted in plaintiff's bill to be owing to the respective defendants, to be payable on or before the 10th day of May, 1932;

And It Is Further Ordered that this restraining shall expire in the office of the clerk of this court its surety bonds to the defendants conditioned upon the payment of [fol. 12] such costs and damages as may be incurred or suffered by such defendants in the event it be found and determined by the court that this temporary injunction shall have been wrongfully issued, and that defendants shall have been by this order wrongfully enjoined, the said bonds to be in the following amounts, that is to say: To Thomas C. Rowley, as Treasurer of Converse County, Wyoming, the sum of $19,000.00; To Charles T. Cole, as Treasurer of Fremont County, Wyoming, the sum of $23,000.00; to Alta Pearl Massee, as Treasurer of Natrona County, Wyoming, the sum of $23,000.00; and to D. A. Shoopman, as Treasurer of Niobrara County, Wyoming, the sum of $17,000.00.

And It Is Further Ordered that the defendants file their answers to plaintiff's bill of complaint in the office of the clerk of this court on or before the 8th day of January, 1932.

And It Is Further Ordered that the motion of defendants to dismiss be, and the same is hereby overruled, to all of which the defendants, and each of them, at the time, duly excepted.

And It Is Further Ordered that this cause be, and the same is hereby set down for trial on the 18th day of February, 1932, at 10.00 o'clock in the forenoon of said day.

Done in Open Court at Cheyenne, Wyoming, this 28 day of December, 1931.

By the Court.

T. Blake Kennedy, Judge.

In United States District Court

Answer—Filed Jan. 7, 1932

Comes Now the above named defendants, and for their answer to plaintiff's Bill in Equity, admit, deny and aver as follows:

1. These defendants, for their answer to the allegations of Paragraph 1 of said Bill in Equity, admit that the plaintiff is a corporation organized and existing under the laws, and a citizen, of the State of Illinois.

2. These defendants, for their answer to Paragraph 2 of said Bill in Equity, admit that the defendant, Thomas [fol. 13] C. Rowley, is, and has been throughout the year of 1931, the duly elected, qualified and acting Treasurer of the County of Converse, State of Wyoming, and is a bona fide resident and citizen of said Converse County, State of Wyoming.

3. These defendants, for their answer to Paragraph 3 of said Bill in Equity, admit that the defendant, Charles T. Cole, is, and has been during the year of 1931, the duly elected, qualified and acting Treasurer of the County of Fremont, State of Wyoming, and is a bona fide resident and citizen of said Fremont County, State of Wyoming.

4. These defendants, for their answer to Paragraph 4 of said Bill in Equity, admit that the defendant, Alta Pearl Massee, is, and has been during the year of 1931, the duly elected, qualified and acting Treasurer of the County of Natrona, State of Wyoming, and is a bona fide resident and citizen of said Natrona County, State of Wyoming.

5. These defendants, for their answer to Paragraph 5 of said Bill in Equity, admit that the defendant, D. A. Shoopman, is the duly appointed, qualified and acting Treasurer of the County of Niobrara, State of Wyoming, and is a

bona fide resident and citizen of said Niobrara County, State of Wyoming.

6. These defendants, for their answer to Paragraph 6 of said Bill in Equity, admit that the amount involved in this suit, exclusive of costs and interest, exceeds the sum of Three Thousand Dollars, ($3,000.00), as to each of the defendants herein named; deny that this suit is a controversy wholly between the citizens of different states.

7. These defendants, for their answer to Paragraph 7 of said Bill in Equity, admit that the Fourteenth Amendment to the Constitution of the United States provides that no state shall make or enforce any law which shall abridge the privileges of immunity of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor shall any state deny to any person within its jurisdiction the equal protection of the law; and further admit that Section 8 of Article I of said Constitution gives to Congress power to regulate commerce among the several states. These defendants deny that this suit involves the construction of said constitutional provisions; deny that plaintiff has at any time, by reason of the acts of these defendants as com-[fol. 14] plained of in said Bill in Equity, been deprived of the full protection and benefit of said constitutional provisions; deny that any acts of these defendants herein have been unlawful and have affected the rights of this plaintiff, and aver that plaintiff has at all times had full protection under, and the benefits of said constitutional provisions in the State of Wyoming.

8. These defendants, for their answer to Paragraph 8 of said Bill in Equity, admit that plaintiff seeks to enjoin the collection by these defendants of certain taxes levied against the property of plaintiff in the State of Wyoming; but deny that said taxes are illegal, and deny that there is any irregularity in the levy of said taxes upon the property of plaintiff and in the demand for payment of said taxes. These defendants deny that plaintiff's property in the State of Wyoming is assessed at a figure greatly in excess of its actual value; deny that other property than that of plaintiff in the State of Wyoming is valued and assessed at not more than sixty per centum of its actual value, and allege the fact to be that all property other

than that of plaintiff is lawfully assessed and taxed; and further allege the fact to be that plaintiff's property is assessed at a sum less in amount than the actual value thereof, and that the actual value of plaintiff's property in the State of Wyoming is the sum of $12,459,492.00. These defendants deny that there has been any unlawful discrimination against the plaintiff in the valuation of its property in Wyoming for taxation and allege the fact to be that the plaintiff has endeavored to induce the State Board of Equalization to discriminate against other taxpayers in Wyoming by having said State Board of Equalization fix the valuation of plaintiff's property in Wyoming at a sum much less than the actual value thereof.

9. These defendants, for their answer to Paragraph 9 of said Bill in Equity, admit that, prior to the first Monday in June, 1931, plaintiff made out its return containing a sworn statement and schedule of all its property, containing data and information required to be furnished in such schedule and statement under the laws of the State of Wyoming, as provided in Chapter 57, Session Laws of Wyoming, 1923; admit that such statement was filed in the office of the Wyoming State Board of Equalization, and aver that said statement so filed by plaintiff showed a valu- [fol. 15] ation of plaintiff's property in Wyoming in the sum of $8,281,950.00; further aver that the actual value of plaintiff's property in Wyoming is $12,459,492.00; that the valuation of said property for taxation in Wyoming for the year 1931 in the sum of $7,881,003.94, was determined without considering all the factors legally entitled to be considered in determining the actual value of plaintiff's property for taxation, and that said sum of $7,881,003.94 is less than the actual value of said property.

10. These defendants, for their answer to Paragraph 10 of said Bill in Equity, admit that a valuation was placed by the Board of Equalization upon plaintiff's property in the State of Wyoming in the sum of $7,989,587.00; admit that before certifying a valuation and assessment as made by the State Board of Equalization upon the plaintiff's property in the several counties in Wyoming to the county assessors of said counties, the said Board did duly notify the plaintiff of the aforesaid valuation and assessment as made and fixed by it, and fixed the 9th day of July, 1931, as a time

when the plaintiff might appear before said Board and present its objections to such valuation and assessment.

11. These defendants, for their answer to Paragraph 11 of said Bill in Equity, admit that on the 9th day of July, A. D. 1931, a hearing was held before the said State Board of Equalization upon objections presented by the plaintiff, and aver that the valuation of plaintiff's property was, as a result of said hearing, reduced from the sum of $7,989,-587.00 to the sum of $7,881,003.94; that plaintiff made no complaint or protest against said valuation of its property in Wyoming. These defendants admit that on the 14th day of July, 1931, the State Board of Equalization fixed the valuation of the property of the plaintiff in the State of Wyoming in the sum of $7,881,003.94; but aver that the actual value of said property in Wyoming was, and is, $12,-459,492.00; deny that $7,881,003.94 is $2,031,433.94 in excess of the actual value of said property, and aver that $7,881,-003.94 is $4,579,488.06 less than the actual value of said property. These defendants further deny that said Board has at any time during the past five years prior to the filing of plaintiff's Bill in Equity, valued the property of plaintiff at a figure more than $2,000,000.00 in excess of the actual value of said property, and aver the fact to be that [fol. 16] plaintiff's property has not, during the past five years, been valued for taxation purposes in Wyoming in any sum in excess of its actual value; deny that the valuation fixed as the assessment for taxation of said property in Wyoming for the year 1931, in the sum of $7,881,003.94, was in excess of the actual value of said property, and aver that said sum so fixed was $4,579,488.06 less than the actual value thereof. These defendants deny that the property of the plaintiff has been subjected to an excess valuation exceeding the actual value thereof in any sum, and aver the tax which the plaintiff has paid in said years upon said property, has been based upon a value of said property in the State of Wyoming not in excess of the actual value thereof; admit that the plaintiff has, during the said years, entered objections to the valuations fixed, and aver that plaintiff has endeavored to induce the State Board of Equalization to place a value on said property less than the act*ion* value thereof for the purpose of effecting a discrimination in favor of the plaintiff and against other taxpayers in the State of Wyoming by permitting plaintiff to pay less than

its full lawful tax in the State of Wyoming; that said plaintiff has, during said time, endeavored to induce the State Board of Equalization to adopt a formula for the purpose of determining the value of plaintiff's property in Wyoming for taxation, which would be inequitable and unfair and would determine said property, if arrived at by said formula, to be of much less value for taxation than the actual value of the same; that said Board has each year, refused to accept such formula and refused to permit plaintiff to pay its tax upon its property determined by such inequitable and unfair method of valuation.

12. These defendants, for their answer to Paragraph 12 of said Bill in Equity, admit that the plaintiff owns and operates a system of railroads with lines extending into and through the states of Illinois, Michigan, Wisconsin, Minnesota, Iowa, Nebraska, North Dakota, South Dakota and Wyoming; admit that it owns and operates in the State of Wyoming, 278.35 miles of main track, and aver that said main track in Wyoming is a part of said system of railroads, and admit that the plaintiff owns in other states than the State of Wyoming, main track miles of road in the amount of 8,180.20 miles; deny that the main track miles [fol. 17] belonging to the plaintiff in the State of Wyoming are less than one-half the value per mile of its miles of main track located outside the State of Wyoming; aver that said main track miles of road in Wyoming are of average value with plaintiff's total main track miles of road in said system of railroads; deny that plaintiff has no switching or terminal facilities or other property aside from its main track of considerable value used in its railroad operations located in the State of Wyoming, and aver that plaintiff has, throughout the entire length of its main track mileage in Wyoming, switching and terminal facilities of a substantial character and of great value. These defendants admit that the plaintiff owns and operates, in connection with its system in other states, elevated tracks, elevators, shops, terminal facilities, double main track lines, ore docks, railway stations and other equipment; but for want of information sufficient to form a belief, deny that said improvements and facilities are of great value; deny that the value of plaintiff's property used in its railway operations and located outside the State of Wyoming, is more than twice the value per mile of road than the said value of its said

property so used and located in the State of Wyoming, and aver that plaintiff's property used and located within the State of Wyoming is of an average value per mile of road with plaintiff's property used and located outside the State of Wyoming. These defendants admit that the Wyoming State Board of Equalization has knowledge of the value of said property of the plaintiff within and without the State of Wyoming, and deny that said Board knew that plaintiff's property used and located outside the State of Wyoming was of more than twice the value per mile of plaintiff's property used and located within the State of Wyoming, and aver that the State Board of Equalization had knowledge and information concerning the character and extent of said property in its entire railroad system; aver that said property of plaintiff used and located outside the State of Wyoming is not of as great a value per mile as plaintiff's property used and located within the State of Wyoming. These defendants deny that the State Board of Equalization determined the entire railway system of the plaintiff used in its railroad operations to be of the value of $375,285,902.00, and aver the fact to be that the plaintiff so valued its property in its entire railway system and used in its railroad operations and represented [fol. 18] to the State Board of Equalization that said amount was the value of its said property in its entire railroad system; admit that the State Board of Equalization considered in fixing the value of plaintiff's property for the purpose of taxation as a factor in making such valuation, the plaintiff's main track miles located within the State of Wyoming as compared to the total main track miles in said entire system; deny that the State Board of Equalization did, arbitrarily and/or unlawfully, fail and neglect to take into account the value of plaintiff's property in Wyoming as compared to the value of its property in other states, and aver that said State Board of Equalization did take into account and consider the value of plaintiff's property in Wyoming as compared to the value of plaintiff's property outside of Wyoming; deny that the value of plaintiff's property in Wyoming is less than one-half of the value per mile of its property located outside the State of Wyoming, and aver that plaintiff's property in Wyoming is of an equal

average value with plaintiff's property located outside of Wyoming, measured by the main track miles in Wyoming, as compared to the main track miles outside of Wyoming; deny that plaintiff's property was valued for taxation by arbitrary and wrongful methods; deny that the value thereof was, by said Board, arbitrarily, fraudulently and unlawfully fixed in a sum approximately $2,000,000.00 in excess of the actual value of said property, and aver that the valuation of plaintiff's property in the State of Wyoming was fixed in a sum of $4,579,488.00 less than the actual value thereof, and allege the fact to be that said property was assessed in a sum less than the actual value of said property located in Wyoming, and that said value was fixed at a sum less than the actual value of said property in Wyoming because all of the factors lawfully entitled to be and which should have been considered in fixing said valuation, were not so considered. These defendants deny that the method used for determining the value of plaintiff's property in Wyoming for taxation purposes, was arbitrary, wrongful or unlawful, and aver that the valuation of plaintiff's property in Wyoming was not determined in an arbitrary or wrongful method, nor in an unlawful manner, except in that said property in Wyoming was not valued for taxation at its actual value, but in a sum less than said actual value thereof. These defendants deny that [fol. 19] the use and consideration of the net operating revenue as a factor in determining said value, was arbitrary, wrongful or unlawful, and aver that a consideration of the net operating revenue as a factor in determining the valuation of plaintiff's property in Wyoming for taxation purposes is a recognized and lawful consideration, and was so considered and used in determining the value of plaintiff's property in Wyoming for taxation purposes.

13. These defendants, for their answer to Paragraph 13 of said Bill in Equity, deny that the State Board of Equalization, particularly in the year 1931, and for several years last past, unlawfully, arbitrarily, knowingly and intentionally, valued plaintiff's property for taxation purposes in the State of Wyoming at about 33⅓% in excess of the actual value thereof, and allege the fact to be that the property of the plaintiff has not been for several years last past, nor in the year 1931, valued for purposes of taxation in Wyoming at a value in excess of its actual value; that

such property was not unlawfully, arbitrarily, knowingly and intentionally valued in a sum in excess of the actual value of such property for taxation purposes in the year 1931, nor for several years last past, by the State Board of Equalization of the State of Wyoming.

14. These defendants, for their answer to Paragraph 14 of said Bill in Equity, deny that it has been the common and universal practice of the county assessors of all of the counties in the State of Wyoming, purposely, intentionally and systematically to place a valuation for purposes of taxation upon the property generally of the taxpayers of said state, greatly less than the actual value of said property, and aver that the valuation of property generally for taxation in the several counties in the State of Wyoming has been determined upon a just valuation at and not less than the actual value thereof; deny that in the years of 1919 and 1920, such property so assessed by the said county assessors, was valued from ten to fifty per centum of the actual value thereof, and aver that said property during the years of 1919 and 1920 was valued for taxation at the actual value thereof; deny that in the year of 1931, the property generally in the State of Wyoming assessed by the county assessors of the said state, was intentionally valued by said county assessors for taxation purposes at not exceeding sixty per centum of the actual value thereof, [fol. 20] and aver the fact to be that property generally in the State of Wyoming assessed by the county assessors for taxation purposes, was not assessed on a valuation less than the actual value thereof; that said assessors endeavored to assess said property generally at its actual value; deny that for years last past and including the year 1931, the said county assessors, with the knowledge and consent of the State Board of Equalization, and knowingly and intentionally omitted entirely from the assessment rolls, certain classes of property legally taxable, not exempt from taxation, amounting in value to the sum of approximately one-fifth of the total assessed valuation of all the property of said State, and aver the fact to be that no property legally taxable in the State of Wyoming and not exempt by statute, has been knowingly and intentionally omitted from the assessment rolls. These defendants aver that said State Board of Equalization has directed said county assessors to assess all property not exempt from taxation

at the actual value thereof and warned said assessors of the penalty imposed by law for failure to so assess all property not exempt from taxation; deny that any undervaluation of property by the county assessors, or any omission by said assessors of property from the assessment rolls has been made and is being made by said county assessors systematically, notoriously, unlawfully, intentionally and with the knowledge and approval of the State Board of Equalization, and for the purpose of unlawfully requiring and compelling plaintiff to pay taxes in any sum in excess of the amount of taxes justly and legally due from it. These defendants further deny that the valuation and assessment of the property of the plaintiff by the State Board of Equalization has been in amount in excess of the actual value of said property; deny that there has been any systematic and intentional undervaluation by the county assessors of all the property located in the State of Wyoming subject to assessment by said county assessors; deny that the action of the county assessors in valuing and assessing all the property located in the State of Wyoming has operated and does operate fraudulently to discriminate against the plaintiff in violation of its rights under the Fourteenth Amendment of the Constitution of the United States.

These defendants further deny that they have acted arbi- [fol. 21] trarily and with fraudulent intent and purpose to place upon the plaintiff, or have placed upon the plaintiff, more than its just share of the taxes of said State; deny that they have discriminated against the plaintiff in violation of the rights of plaintiff under the provisions of the Constitution of the United States; deny that a valuation has been fixed and the assessment for tax purposes placed upon plaintiff's property in excess of the actual value thereof; and aver that plaintiff's property in Wyoming has been assessed and valued for purposes of taxation at a sum less than the actual value thereof; deny that the valuation of property generally throughout the State of Wyoming other than that of the plaintiff, has been fixed at not more than sixty per centum of its value; and allege the fact to be that all of said property subject to taxation in the State of Wyoming except the property of plaintiff has been valued for the purpose of taxation at not less than its actual value and

without discrimination against the plaintiff; deny that plaintiff has had placed upon it more than its just share of the taxes of the State of Wyoming; and aver that plaintiff has not had placed upon it its just share of the taxes of the state.

15. These defendants, for their answer to Paragraph 15 of said Bill in Equity, admit that the valuation of $7,881,003.94 was the equalized value of plaintiff's property in the counties of Converse, Fremont, Natrona and Niobrara as certified to said county assessors by the State Board of Equalization; that the value in Converse County of plaintiff's property for taxation purposes, was $2,017,039.00; that the value of plaintiff's property in Fremont County for taxation, was $2,176,159.00; that the value of plaintiff's property in Natrona County for taxation, was $2,416,339.00; and that the value of plaintiff's property in Niobrara County for taxation, was $1,271,267.00; admit that said amounts so stated above were duly certified by the State Board of Equalization as the value in each of said counties of plaintiff's property upon which the tax levy against the plaintiff's property should be made. These defendants deny that said valuations were unlawful, except in that the valuations as so certified are, in fact, less than the actual value of the property of plaintiff in said counties and subject to taxation therein, and less than the actual value as fixed and certified to the State Board of Equaliza-
[fol. 22] tion by the plaintiff; admit that the respective valuations as made by the assessors in said counties, were spread upon the tax assessment rolls of said respective counties, and by them certified to the defendant county treasurers of said counties for collection; deny that defendants claim, and unless restrained by order of this court, will collect any tax or compel the plaintiff to pay any tax or any sum in taxes upon the property of the plaintiff in the counties above named in Wyoming, upon an unlawful valuation; deny that there was an excessive and, therefore, unlawful valuation of plaintiff's property in Converse County, and allege the fact to be that the actual value of plaintiff's property, as so certified by the State Board of Equalization to the county assessor for assessment and taxation purposes in said county, was, in fact, more than the sum of $2,017,039.00; deny that there was an excessive, and, therefore, an unlawful valuation of plaintiff's prop-

erty in Fremont County, and allege the fact to be that the actual value of plaintiff's property as so certified by the State Board of Equalization to the county assessor for assessment and taxation purposes in said county, was, in fact, more than the sum of $2,176,159.00; deny that there was an excessive, and, therefore, an unlawful valuation of plaintiff's property in Natrona County, and allege the fact to be that the actual value of plaintiff's property as so certified by the State Board of Equalization to the county assessor for assessment and taxation purposes in said county, was, in fact, more than the sum of $2,416,339.00; deny that there was an excessive and, therefore, an unlawful valuation of plaintiff's property in Niobrara County, and allege the fact to be that the actual value of plaintiff's property as so certified by the State Board of Equalization to the county assessor for assessment and taxation purposes in said county, was, in fact, more than the sum of $1,271,267.00.

These defendants deny that there has been an excessive and unlawful valuation of plaintiff's property within the State of Wyoming, and deny that there has been any unlawful discrimination in the valuation of the property of the plaintiff as against other property subject to taxation in the State of Wyoming; deny that there has been, in the fixing of the values and the assessment for taxation of plaintiff's property, any violation of the rights of the plaintiff under the provisions of the Constitution of the United States.

[fol. 23] These defendants admit that under the statutes of the State of Wyoming, one-half of plaintiff's taxes will become delinquent on the 10th day of November, 1931, and one-half delinquent on the 10th day of May, 1932, provided that if no part thereof shall be paid before the said 10th day of November, 1931, the whole thereof will become delinquent on the 1st day of January, 1932. These defendants further admit that said taxes, if not paid at the time herein stated, will draw interest after the same become delinquent at the rate of 15% per annum; admit that if said taxes are not paid, plaintiff's property will be distrained and sold for the collection of said tax; admit that said taxes constitute a lien upon plaintiff's property located in said counties in the State of Wyoming, and that said tax, if not paid, will constitute a cloud upon plaintiff's title to said property;

but for want of information sufficient to form a belief, deny that such tax will interfere with the efforts and ability of the plaintiff to finance its operations and carry on its business as a common carrier of interstate commerce.

16. These defendants, for their answer to Paragraph 16 of said Bill in Equity, deny that plaintiff has no plain, speedy and adequate remedy at law; deny that any unlawful acts have been committed by said defendants against plaintiff or plaintiff's property, as in said Bill in Equity complained; deny that any acts of these defendants will result in great and irreparable loss to the plaintiff; deny that unless an injunction, as prayed for, is granted by the court, irreparable loss will occur to the plaintiff, and alleges the fact to be that plaintiff has a plain, speedy and adequate remedy at law and can recover any sum or sums illegally paid as a tax against the property of the plaintiff; that plaintiff will sustain no great and irreparable loss by reason of any act or acts committed by said defendants unless an injunction be granted, as prayed for by the plaintiff.

17. These defendants, for their answer to Paragraph 17 of said Bill in Equity, deny that the actual value of plaintiff's property in the State of Wyoming, subject to valuation and assessment by the State Board of Equalization, is $5,849,570.00, and alleges the fact to be that the actual value of said property in the State of Wyoming is $12,459,492.00; deny that for the purpose of making the valuation [fol. 24] of plaintiff's property uniform with that placed on property in said state generally, it should be valued at not more than $3,509,742.00, apportioned to the several counties, as provided by law, and allege the fact to be that the lawful valuation of plaintiff's property in said State of Wyoming is $12,459,492.00. Defendants aver that plaintiff, in its annual statement as filed with the State Board of Equalization prior to the first Monday in June, 1931, certified a valuation fixed by plaintiff as the actual value of its property subject to taxation in Wyoming, to be in the sum of $8,281,950.00; and defendants aver that said sum of $8,281,950.00, as so certified to said State Board of Equalization by plaintiff, was not the actual value of plaintiff's property owned, located and used by plaintiff in the State of Wyoming; that said actual value is $12,459,492.00.

These defendants deny that the taxes for the year of 1931 are properly assessable upon plaintiff's property in the County of Converse in the sum of $24,025.37; deny that the taxes for the year 1931 are properly assessable upon plaintiff's property in the County of Fremont in the sum of $28,933.81; deny that the taxes for the year 1931 are properly assessable upon plaintiff's property in the County of Natrona in the sum of $28,621.09; deny that the taxes for the year 1931 are properly assessable upon plaintiff's property in the County of Niobrara in the sum of $19,583.41—these figures being merely speculative and based upon 60% of the amounts assessed against plaintiff in the various counties of the State and which latter amounts are 60% of those certified to said county assessors against plaintiff's property on an equalized valuation of $7,881,003.94.

These defendants aver the fact to be that the amount of the taxes for the year 1931 on plaintiff's property in the County of Converse is the sum of $63,299.31, based on the actual value of plaintiff's property located in said Converse County; alleges the fact to be that the taxes for the year 1931 on plaintiff's property in the County of Fremont is the sum of $76,232.08, based on the actual value of plaintiff's property located in said Fremont County; allege the fact to be that the taxes for the year 1931 on plaintiff's property in the County of Natrona is the sum of $75,415.76, based on the actual value of plaintiff's property located in said Natrona County; allege the fact to be that the taxes [fol. 25] for the year 1931 on plaintiff's property in the County of Niobrara is the sum of $51,592.61, based on the actual value of plaintiff's property located in said Niobrara County.

These defendants further aver that $7,881,003.94 is only 63.26% of its actual value, to-wit, $12,459,482.00.

These defendants admit that one-half of the tax legally and lawfully assessed against the plaintiff on its property in the State of Wyoming has become due and payable; deny that plaintiff has always been, and is now willing to do justice and to pay all taxes legally chargeable to it; deny that it has tendered and offered to pay to the defendants herein the full amounts now due and payable, and allege the fact to be that it has refused to pay the full amounts now due and chargeable to it as taxes upon its property in

Wyoming and allege the fact to be that it has refused to tender and has not offered to pay defendants the full amounts now due and payable as taxes upon its property within the counties of Converse, Fremont, Natrona and Niobrara, in the State of Wyoming, but admit that plaintiff has offered to pay the following amounts, which it alleges are the full amounts now due and payable upon its property within said counties, and admit that said sums have been tendered to the said counties as follows, to-wit:

To defendant Treasurer of Converse County, $12,012.69;
To defendant Treasurer of Fremont County, $14,466.91;
To defendant Treasurer of Natrona County, $14,310.55;
To defendant Treasurer of Niobrara County, $9,761.91;

and said defendants aver that said respective sums as so tendered, are not the full legal amounts lawfully due from said plaintiff to said defendants, but are less than said lawful amounts.

For want of information sufficient to form a belief, these defendants deny that the plaintiff is ready and willing to pay such other amounts, if any, as and when the court shall determine the same to be due and payable.

These defendants aver that plaintiff, in its annual statement, as filed with the State Board of Equalization prior to the first Monday in June, 1931, did duly submit for the year 1930, its verified tax return to said State Board of Equalization and therein certified a value fixed and determined by [fol. 26] plaintiff as the actual value of its property subject to taxation in Wyoming, to-wit, the sum of $8,281,950.00, as the basis for computing plaintiff's tax in the State of Wyoming, and that plaintiff is, and in equity and good conscience ought to be estopped from now claiming that its property subject to taxation in the State of Wyoming is of a less actual value than the sum of $8,281,950.00, so certified by it to the State Board of Equalization.

These defendants aver that during the period from 1926 to 1930, inclusive, said plaintiff did duly submit its verified tax return statement in the following figures, to-wit:

1926—$9,517,351.00.
1927—$8,532,681.00.
1928—$8,274,486.00.
1929—$8,262,732.00.
1930—$8,281,950.00.

that for said respective years and upon objections as made by plaintiff, the valuation of plaintiff's property located and used in Wyoming was reduced and valued for taxation in a sum less than the certified value submitted by said plaintiff to said State Board of Equalization and in the following amounts, to-wit:

1926—$7,955,791.00.
1927—$8,104,178.00.
1928—$8,000,757.00.
1929—$7,970,916.00.
1930—$7,881,094.00.

that during each of said years the said property of the plaintiff has been assessed upon a valuation less in amount than the actual value thereof.

Defendants aver that the amount of tax lawfully assessable against the property of the plaintiff located and used in the State of Wyoming for the year 1931 is the sum of $271,539.76; and that said sum should be paid as taxes in the following counties as follows:

$65,299.31 to the County Treasurer of Converse County;
$76,232.08 to the County Treasurer of Fremont County;
$75,415.76 to the County Treasurer of Natrona County;
$56,592.61 to the County Treasurer of Niobrara County;

[fol. 27] that the plaintiff is lawfully indebted to the State of Wyoming for the payment of said respective sums to said county treasurers as the lawful tax assessable against its property in Wyoming for the year 1931 based upon the actual value of the property of the plaintiff used and located within the State of Wyoming.

Wherefore, these defendants respectfully pray that the plaintiff's prayer for a permanent injunction enjoining the defendants, as county treasurers of said counties from collecting the taxes due from the plaintiff to said county treasurers be denied; that the temporary injunction heretofore granted be vacated and dissolved; that plaintiff be ordered to pay in the manner provided by law the sum of $63,299.31, as taxes for the year 1931 to the County Treasurer of Converse County; $76,232.08, as taxes for the year 1931, to the County Treasurer of Fremont County; $75,415.76, as taxes for the year 1931, to the County Treasurer of Na-

trona County; and $56,592.61, as taxes for the year 1931, to the County Treasurer of Niobrara County; that plaintiff's Bill in Equity be dismissed; that the defendants recover their costs herein and be granted such other and further relief as to this court may seem just and equitable.

J. A. Greenwood, Attorney General of Wyoming; Richard J. Jackson, Deputy Attorney General of Wyoming; George W. Ferguson, Assistant Attorney General of Wyoming, Attorneys for Defendants.

Duly sworn to by James A. Greenwood. Jurat omitted in printing.

[fol. 28] IN UNITED STATES DISTRICT COURT

R. R. Rose and Vincent Mulvaney of Casper Wyo., and Wilfred O'Leary of Cheyenne, Wyo., for Plaintiff.

J. A. Greenwood, Attorney General, Richard J. Jackson, Deputy Attorney General, George W. Ferguson and R. Dwight Wallace, Assistant Attorneys General, of Cheyenne, Wyo., and John D. Dawson of Douglas, Wyo., H. S. Harnsberger of Lander, Wyo., George A. Weedell of Casper, Wyo., and F. A. Barrett of Lusk, Wyo., for Defendants.

JUDGE'S MEMORANDUM—Filed Aug. 30, 1932

Decided August 30, 1932

KENNEDY, Judge:

The above entitled cause is a suit in equity against the treasurers of four counties in the State of Wyoming which the railroad of plaintiff traverses, to restrain the collection of alleged illegal taxes. It is brought upon the theory that the property of the plaintiff has been systematically and intentionally overvalued by the State Board of Equalization and that the property of other taxpayers in the same counties has been systematically and intentionally undervalued, resulting in a discrimination against the plaintiff. Upon the filing of the suit a temporary restraining order was sought and upon the payment of a certain portion of the assesed tax by the plaintiff to the respective treasurers, such restraining

order was granted as to the balance and the matter thereupon set down for hearing for a temporary injunction upon notice. After several continuances by consent of counsel, a hearing was had and an interlocutory injunction allowed. Issues were thereafter joined and the case proceeded to final hearing and a time given for the filing of trial briefs.

Upon the issues, the suit naturally divides itself into two phases; (1) the question as to whether this court has jurisdiction of a case of this character and, (2) in the event the jurisdiction of the court is sustained, whether the plaintiff is entitled to the relief prayed for upon the evidence offered in support of its bill.

Two recent decisions of the Supreme Court seriously challenge the equity jurisdiction of the Federal district court in suits to restrain the collection of taxes. These decisions [fol. 29] came to light after the case had been heard upon the merits. They seem to be primarily based upon the provisions of 28 U. S. C. A. 384 (R. S. Sec. 723), which reads:

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

The pertinent sections of the Wyoming statutes, found in Wyoming Revised Statutes 1931, are as follows:

Sec. 89-4202: "Actions to enjoin the illegal levy of taxes and assessments must be brought against the corporation or person for whose use and benefit the levy is made; and if the levy would go upon the tax list, the county treasurer must be joined in the action."

Sec. 89-4203: "Actions to enjoin the collection of taxes and assessments must be brought against the officer whose duty it is to collect the same; actions to recover back taxes and assessments must be brought against the officers who made the collection, or, if he is dead, against his personal representative; and when they were not collected on the tax list, the corporation which made the levy must be joined in the action; provided, that when the money derived from said taxes or assessments has been actually paid over to any county or municipal corporation for whose use and benefit it was levied or collected, then an action shall be brought against said county or municipal corporation to recover said taxes or assessments."

Sec. 115-311: "In all cases where any person shall pay any tax, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to clerical errors or other errors, the board of county commissioners shall direct the treasurer to refund the same to the taxpayer, or, in case any real property subject to taxation, shall be sold for the payment of such erroneous tax, the error in tax may at any time be corrected as above provided, and shall not affect the validity of the sale, but such property shall be redeemed by the county as hereinafter set forth."

[fol. 30] It would seem that the taxpayer in Wyoming is afforded various methods of relief against illegal taxation. In the case of Matthews et al. v. Rodgers, 284 U. S. 521, decided February 15, 1932, Mr. Justice Stone in speaking for the court at page 524, 525, 526, says:

"The right of appellees, if any, to maintain the present suit, is conferred by Sec. 24 of the Judicial Code, 28 U. S. C., Sec. 41 (1), which, regardless of the citizenship of the parties to the suit, vests in district courts of the United States jurisdiction over suits at law or in equity 'arising under the Constitution or laws of the United States,' where the matter in controversy exceeds $3,000. Although the present suit arises under the Constitution of the United States, see Davis v. Wallace, 257 U. S. 478, and it being assumed, without deciding, that the jurisdictional amount is involved, the suit cannot be maintained if not within the equity jurisdiction of the district court. The want of equity jurisdiction, if obvious, may and should be objected to by the court of its own motion. Twist v. Prairie Oil Co., 274 U. S. 684, 690. In other cases, this jurisdictional requirement, unlike the others mentioned, may be treated as waived if the objection is not presented by the defendant in limine. Duignan v. United States, 274 U. S. 195, 199; Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 484; Thompson v. Railroad Companies, 6 Wall. 134; compare Matson Navigation Co. v. United States, ante, p. 352; Hilton v. Dickinson, 108 U. S. 165, 168; Grace v. American Central Ins. Co., 109 U. S. 278, 283-284; Bors v. Preston, 111 U. S. 252, 255. Here, the objection to the equity jurisdiction of the district court was properly raised by appellants' motion to dismiss the bill, and is preserved by their assignments of error in this Court.

"Section 16 of the Judiciary Act of 1789, 1 Stat. 82, perpetuated without material change as Rev. Stat. 723, 28 U. S. C. Sec. 384, Jud. Code Sec. 267, declares that suits in equity shall not be sustained in the courts of the United States 'in any case where plain, adequate and complete remedy may be had at law.' The effect of this section, which was but declaratory of the rule in equity, established long before its adoption, is to emphasize the rule and to forbid in terms recourse to the extraordinary remedies of [fol. 31] equity where the right asserted may be fully protected at law. See Deweese v. Rinhard, 165 U. S. 386, 389; New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205, 214.

"The reason for this guiding principle is of peculiar force in cases where the suit, like the present one, is brought to enjoin the collection of a state tax in courts of a different though paramount sovereignty. The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this court for review if any federal question be involved, Jud. Code Sec. 237, or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present. See Boise Water Co. v. Boise City, 213 U. S. 276; Skelton v. Platt, 139 U. S. 591; Dows v. Chicago, 11 Wall. 108, 110, 112."

It is now apparent regardless of what formerly appeared to be the theory expressed by that court in Cummings v. National Bank, 101 U. S. 153, that the mere fact of a state statute authorizing a suit to restrain the collection of taxes does not of itself confer jurisdiction of such a suit upon the Federal court. In Matthews v. Rodgers, supra, at page 529, the court says:

"While local statutes may create new rights, for the protection of which recourse may be had to the remedies afforded by Federal courts of equity if the remedy at law is inadequate and the other jurisdictional requirements are present, state legislation cannot enlarge their jurisdiction by the creation of new equitable remedies, nor can it avoid or dispense with the prohibition against the maintenance of any suit in equity in the Federal courts, where the legal remedy is adequate."

[fol. 32] Upon the same day the Supreme Court decided the case of Stratton v. St. Louis Southwestern Railway Co., 284 U. S. 530, in which the holding is expressed in the syllabus in the following language:

"A suit will not lie in a Federal court to enjoin a state officer from collecting a tax that violates the Federal Constitution, where the state law affords a legal remedy through payment of the tax under protest and suit to recover it from the collecting officer, and no special circumstances are alleged in the bill which would render the legal remedy inadequate."

In the face of the exceedingly strong language used by the Supreme Court in Matthews v. Rodgers, a district court should hesitate to assume jurisdiction in cases of this character, unless it appears that plaintiff's asserted right may not be preserved without the Federal court taking jurisdiction. In the case at bar, the plaintiff has the statutory right in the State courts to test its claim by suits to enjoin the collection of the alleged illegal tax. It also has the right to pay the tax and maintain actions at law to recover the same back. It may perhaps bring such causes of action in the Federal court, other proper conditions obtaining.

In any event, as it appears to me, there is nothing in the bill or proofs which justifies the conclusion that the plaintiff does not have a plain, speedy and adequate remedy at law under the Wyoming statutes, which defeats the jurisdiction of the Federal court. The plaintiff in its reply brief relies upon the theory of the avoidance of a multiplicity of suits, but this nowhere appears in the bill nor is there any showing that the bringing of such suits would work a particular hardship or inconvenience upon the plaintiff.

The motion for leave to amend filed after the case was submitted does not appeal to the court as being adequate under the circumstances here existing and it will be overruled. If the restrained tax be paid suits may be immediately brought for the recovery before the fund is disbursed. At most, under the circumstances here, as it appears to me, the test of the validity of the tax through a bill in equity, is perhaps a greater convenience to the plaintiff, but this is not sufficient. The Henrietta Mills v. Rutherford County, 281 U. S. 121. On account of the circumstances heretofore [fol. 33] mentioned, it would seem that the ruling in Wilson v. Illinois Southern Railway Co. et al., 263 U. S. 574, does not apply. The decisions leave the point as appearing in the case at bar somewhat clouded.

The conclusion reached upon the question of jurisdiction makes it unnecessary to consider the other phase of the controversy. Findings, conclusions and a decree dismissing plaintiff's bill with costs and reserving to it proper exceptions, may be prepared through collaboration of counsel and submitted to the court on October 17, 1932, and an order may be entered in instanter fixing the time as aforesaid to submit such findings, conclusions and decree.

IN UNITED STATES DISTRICT COURT

JUDGE'S MEMORANDUM—Filed Nov. 9, 1932

Decided Nov. 9, 1932

KENNEDY, Judge:

This suit is one to restrain the collection of alleged illegal taxes by the treasurers of four counties named as defendants, upon the ground that the taxes so assessed and levied violate the commerce, due process and equal protection clauses of the Federal Constitution. The case was previously argued and submitted to the court, one of the defenses interposed being the lack of jurisdiction of this court upon the ground that the plaintiff had not established that it had no adequate remedy at law. On August 30, 1932, the court filed a written memorandum sustaining such defense and providing for the dismissal of plaintiff's bill, without considering the other points involved. Doubt was

expressed by the decision upon this point, the court relying principally upon the recent decision of the Supreme Court in Matthews v. Rogers, 284 U. S. 521. Thereafter [fol. 34] and before the decree was entered in accordance with the memorandum, counsel for plaintiff requested an opportunity to re-argue the point as to the jurisdiction, which was granted by an order duly entered providing for a reopening of the case. The question of the jurisdiction was again presented in more elaborate form. The court has reached the conclusion that upon a more thorough examination of the authorities, the jurisdiction of the court should be sustained. This conclusion is based upon the theory that, regardless of the plaintiff having failed in the bill to plead the element of multiplicity of suits, yet this element is clearly evident from the fact set up, to the effect that four separate and distinct county treasurers would be necessary defendants in actions for relief in the State courts located in several different judicial districts. This situation brings into force and effect conditions described in some of the Supreme Court decisions which would appear to rule this case. The element of multiplicity of suits has long been regarded as one which, if established, will give a Federal court of equity jurisdiction. In Union Pacific Railway Co. v. Weld County, 247 U. S. 282, Mr. Justice Van Devanter in speaking for the court, says:

"Whether the section named is still in force, unqualified and unmodified, is the important question. If not in force, a single action at law would not suffice, for then it would be necessary to bring a separate action against each of several school districts and towns for its part of the tax. See Raymond v. Chicago Union Traction Co., supra, pp. 39-40. If the section has been so qualified and modified that the continued existence of the right originally conferred on the taxpayer is involved in uncertainty, an essential element of the requisite remedy at law is wanting; for as this court has said, 'It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. * * * Where equity can give relief plaintiff ought not to be com-

pelled to speculate upon the chance of his obtaining relief at law.' Davis v. Wakelee, 156 U. S. 680, 688."

Again discussing the point in Wilson v. Illinois Southern Railway Co., 263 U. S. 574, Mr. Justice Holmes at 576, uses the following language:

[fol. 35] "The appellants rely mainly upon Keokuk & Hamilton Bridge Co. v. Salm, 258 U. S. 122. In that case a bill charging fraudulent overvaluation was dismissed and the dismissal was affirmed by this Court on two grounds, that there was an adequate remedy at law and that the plaintiff had not tendered or offered to pay the amount confessedly due. The latter ground is absent here. As to the former it seems to us that the present case is to be distinguished. Keokuk v. Hamilton Bridge Co. v. Salm arose upon an assessment of real estate by county assessors in a single county, as to which the remedies available were pointed out. Here the assessment was of property in five counties, by the State Board of Equalization for 1917 and 1918, and by its successor the State Tax Commission for the two later years. Assuming that in each of the counties before the tax could be collected a judgment must be obtained in the county court in a civil suit and that in such suits the defendants, the present plaintiffs, could set up the facts here relied upon, as in the Keokuk Co.'s case, not only would those suits be many, but there would be insuperable difficulty in determin-g what the proper assessment against the whole road should be and in apportioning the due share to the county concerned. This difficulty would recur in each of the five counties with not improbably different results in each. It seems to us that the right of full defence in those suits, if it exists, is not an adequate remedy at law. Raymond v. Chicago Union Traction Co., 207 U. S. 20, 38-40. Kirby v. Lake Shore & Michigan Southern R. R., 120 U. S. 130, 134."

The principle there announced has recently been recognized by a Three-Judge Court in our own Circuit in the case of Broadway Express v. Murray, 60 Fed. (2d) 293, where at 297 Judge Kennemar says:

"The remedy here sought in equity is well founded. It is true the mere illegality of a tax does not authorize an injunction against its enforcement. There must be an ab-

sence of a plain, adequate, and complete legal remedy. Title 28, U. S. Code, Section 384 (28 U. S. C. A. Section 384); Matthews v. Rodgers, 284 U. S. 521, 52 S. Ct. 217, 76 L. Ed. 447; Stratton v. St. Louis S. W. Ry. Co., 284 U. S. 530, 52 S. Ct. 222, 76 L. Ed. 465. But the plaintiff [fol. 36] had no such remedy. The monthly payment of mileage and other annual taxes required by section 9, c. 253, Sess. Laws 1929, would necessitate a multiplicity of suits to test the legality of those taxes between the same parties and involving the same issues."

In any event, a decision on the merits of the case in this court under the circumstances presented, would seem to bring forward a settlement of the litigation in the appellate courts upon all the points involved.

Proceeding therefore to a consideration of the questions involved in the suit upon the merits, we are confronted here with facts which outline in detail the manner in which the State Board of Equalization arrived at the valuation of the plaintiff's property in Wyoming, which was subsequently certified under the statute to the several county boards. The first step taken by the board was, to determine the entire value of the property of the plaintiff wherever located. This item was calculated by taking the average market value of the plaintiff's stocks and bonds over a period of five years and deducting therefrom the value of its non-operating property locally assessed from which a figure of $385,800,085.00 was secured. The next step was to capitalize the average income at six per cent over the same period, which produced the figure of $364,771,720.00. The addition of these two items made a total of $750,571,-805.00. Dividing this figure by two, produced a figure of $375,285,902.00, at which the entire property of plaintiff's system was valued. With this process the plaintiff seems to have no complaint and in fact, advocated its adoption in arriving at the valuation of the system.

The next step taken was in the matter of allot-ing the proper proportion of such value to the property located and assessible in the state. The first factor likewise upon which the plaintiff and defendants agree is, that the traffic units operating in the state is 1.58% of the entire system. The next factor used by the taxing authorities is that of the use of rolling stock, which is determined to be 1.65%

of the whole, likewise acceptable to both plaintiff and defendants. The next factor used was that of operating revenue upon which the parties disagree, plaintiff claiming that the operating revenue as shown by the records of the company should be adopted as the element to be considered, while the testimony tends to show a figure purport-[fol. 37] ing to be adopted by the commission arrived at by taking the gross operating revenue plus the net operating revenue and by the division of the two would give the proper average for this element. The figure arrived at by the board by this method purports to be 1.89%, but which from the items used indicates a mistake in computation of the board, as 1.79% would be the proper result of such average. While the defendants contend that the unit of net operating revenue, which is 1.46%, should have been adopted, it has offered no authorities sustaining such contention and therefore the basis as adopted by the board on this point should not be disturbed, with the exception that the correction should be made in the figures making said item 1.79%.

The chief controversial question is over the adoption by the board of the mileage percentage in Wyoming as a proper factor in fixing valuation. There is no dispute over the figure itself, which is 3.29%, but the plaintiff contending that it is not a proper element of fixing value under the circumstances of the case at bar, although the records showed that the board used it as a determining factor. The computation of the board was arrived at by an addition of the traffic units at 1.58%, the use of the rolling stock at 1.65%, the average of the gross and net revenue at 1.89%, and the mileage percentage of 3.29%, making a total of 8.41%, which divided by four, representing the four factors, gives an average basis of 2.10%, thereby fixing the valuation adopted by the board at $7,881,003.04 (there is an apparent error of ten cents which may be disregarded).

It is undoubtedly true that the mileage percentage factor is a proper one under certain circumstances, as has repeatedly been announced by the Supreme Court. It is still recognized in cases where the conditions surrounding the tracks and facilities of a railroad are substantially the same in one state as in another. Where, therefore, these conditions are different as shown by the evidence, it would

seem that the high court has found against the adoption of the factor in the way of giving a fair equalization of value.

The distinction was brought to light in the case of Pittsburgh Railway Co. v. Backus, 154 U. S. 421, where Mr. Justice Brewer discussed the subject, but the case passed into an affirmance by a divided court, presumably upon [fol. 38] the theory that there was no evidence which justified the interference of a court of equity.

In Fargo v. Hart, 193 U. S. 490, Mr. Justice Holmes discusses the principal at page 499 and differentiates the cases of the Supreme Court. His language is as follows:

"The general principles to be applied are settled. A state cannot tax the privilege of carrying on commerce among the states. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce along the states. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the state in taxing even though the other parts of the system are outside of the state. The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get at the worth of such a line in the absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the state to the whole system. Western Union Telegraph Company v. Taggart, 163 U. S. 1, 21, 22. And this principle, established by many cases, has been extended by the cases first cited above to the lines of express companies, although those lines are not material lines upon the face of the earth. There is the same organic connection as in the other cases.

"It is obvious however that this motion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the state, under the name of enhanced value or good will, if it is not closely confined to its true

meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in [fol. 39] one state equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the state under a pretense. Pittsburg, Cincinnati, Chicago & St. Louis Ry. v. Backus, 154 U. S. 421, 431; Western Union Telegraph Co. v. Taggart, 163 U. S. 1, 23. The same principle applies to personal property which the state would not have the right to tax directly. Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 227; S. C. 166 U. S. 185, 222, 223. In Pittsburg, Cincinnati, Chicago & St. Louis Ry. v. Backus, there was reason to suspect an infraction of constitutional rights, but the Secretary of State testified that there was no assessment of property outside the state, 154 U. S. 434, and therefore the court could not say that there was more than a possible overvaluation by the board. Of course if the board did not go beyond its jurisdiction its decision was final. But the court recognized that if the facts charged had appeared the case would have been different. In the Express Companies' cases previously decided, it was pointed out that th-re was nothing to show that the line might not fairly be assumed to be of substantially the same value throughout. But it was intimated on the pages just cited that if the companies should prove the fact to be otherwise a different rule would apply, and the statutes were construed not to prevent such a difference from being taken into account."

In that case the lower court was reversed, also by a divided court.

In Union Tank Line Co. v. Wright, 249 U. S. 275, the court clearly holds that the mileage percentage basis where the evidence showed that the line in one state was substantially different than it is elsewhere, amounted to an arbitrary method which produced results wholly unreasonable. At pages 282-283 the court says:

"A state may not tax property belonging to a foreign corporation which has never come within its borders—to do so under any formula would violate the due process

clause of the Fourteenth Amendment. In so far, however, as movables are regularly and habitually used and employed therein, they may be taxed by the state according [fol. 40] to their fair value along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation must be just it need not be limited to mere worth of the articles considered separately but may include as well 'the intangible value due to what we have called the organic relation of the property in the state to the whole system.' How to appraise them fairly when the tangibles constitute part of a going concern operating in many states often presents grave difficulties; and absolute accuracy is generally impossible. We have accordingly sustained methods of appraisement producing results approximately correct—for example, the mileage basis in case of a telegraph company (Western Union Telegraph Co. v. Massachusetts), and the average amount of property habitually brought in and carried out by a car company (American Refrigerator Transit Co. v. Hall). But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause of the Fourteenth Amendment or both. Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530; Marge v. Baltimore & Ohio R. R. Co., 127 U. S. 117; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 26; Adams Express Co. v. Ohio, 165 U. S. 194; s. c., 166 U. S. 185; American Refrigerator Transit Co. v. Hall, 174 U. S. 70; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149; Fargo v. Hart, 193 U. S. 490; Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 453.

"In the present case the Comptroller General made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all states. Real values—the essential aim—of property within a state cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto. During a year two or three cars might pass over every mile of railroad in one state while hundreds constantly employed in another moved over lines of less total length. Fifty-seven was the average number of cars within Georgia during 1913 and each had a 'true' value of $830. Thus the total there subject to taxation

amounted to $47,310—the challenged assessment specified $291,196.

[fol. 41] "We think plaintiff in error's property was appraised according to an arbitrary method which produced results unreasonable and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce."

In Wallace v. Hines, 253 U. S. 66, Mr. Justice Holmes in again delivering the opinion of the court, discusses the element of mileage percentage at page 69 in the following language:

"As the law is administered, the tax commissioner fixes the value of the total property of each railroad by the total value of its stocks and bonds and assesses the proportion of this value that the main track mileage in North Dakota bears to the main track of the whole line. But on the allegations of the bill, which is all that we have before us, the circumstances are such as to make that mode of assessment indefensible. North Dakota is a state of plains, very different from the other states, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The state is mainly agricultural. Its markets are outside its boundaries and most of the distributing centers from which it purchases also are outside. It naturally follows that the great and very valuable terminals of the roads are in other states. So looking only to the physical track the injustice of assuming the value to be evenly distributed according to main track mileage is plain. But that is not all.

"The only reason for allowing a state to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the state. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state."

[fol. 42] Applying the principal of these cases to the case at bar, I am clearly of the opinion that the facts before the board and now before the court, are sufficient to justify the conclusion that the track mileage percentage was and is an impotent and erroneous factor in fixing the value of the plaintiff's property in the State of Wyoming, and its use by the board with the true facts before it amounted to an arbitrary and unreasonable method, transcending plaintiff's constitutional rights. It is true that it was only used by the State Board as one of the factors, yet if it were erroneous it is as potent in arriving at an improper figure of valuation as though it were used as the sole factor, differing in degree only when used with other factors in the overvaluation which it produces, as distinguished from a greater overvaluation which it would produce if used singly. The testimony in the case clearly shows that the differences of plaintiff's line in Wyoming as compared with its lines outside consists in its physical track, the distance between stations, the absence of expensive terminal facilities and the like, which all make for overvaluation in Wyoming when the mileage precentage factor is used. I shall not attempt to rehearse the evidence directed to this point, but content myself with the feeling that it is sufficient to justify the conclusion reached.

The remaining point in the case revolves around plaintiff's contention, that plaintiff's property has been consistently, continuously and intentionally valued upon a different and a higher basis than other property in the state, together with the claim that much taxable property in the state has been continuously and intentionally omitted from taxation lists. Evidence has been presented on behalf of the plaintiff tending to support its contention in this respect. When the proofs are analized, however, it must be admitted that so far as the agricultural and grazing land valuations are concerned, they generally represent the true and full value of such properties. In other classes of property, there are isolated instances in some of the counties through which plaintiff's line passes, where there may have been valuations for assessment at less than the true value. These proofs, however, in my opinion, do not reach the dignity of a continuous, studied and intentional undervaluation, nor is there any showing which justifies the conclusion that there was a studied attempt on the part of

the taxing officials to bring about a favorable result to one [fol. 43] class of taxpayers over another. As to the alleged failure on the part of the taxing officials to tax all property not exempt from taxation, the evidence tends to show that certain classes of property were not taxed, but this was not on account of officials desiring to omit the same from taxation but more on account of the fact that owing to the nature of the property it was impossible to secure sufficient evidence of its existence to justify its listing for taxation purposes. The statements in the reports to the State Board if relied upon by plaintiff in regard to the escape of property from taxation justifies only the conclusion, which nearly everyone knows, that it is practically impossible under the present system of taxation to effect the listing of all property. The evidence presented does not therefore justify the granting of relief to the plaintiff upon this ground, in the face of a fair showing that reasonable and honest effort was made to fairly and honestly tax property and to secure the return of all property for taxation which is legally taxable.

Recapitulating, the conclusions of the court are, that the plaintiff is entitled to relief upon the basis of the erroneous inclusion of the track mileage percentage as a factor in determining the valuation of plaintiff's property in Wyoming; that is, its use as a factor in the manner in which it was here used without making proper allowances for the difference in proportionate values as existing in Wyoming in comparison with the property of plaintiff in other states. In fact, it is rather apparent that the mileage percentage basis under the circumstances in the case at bar would not be adapted to any method of determining value unless it were possible to equalize this factor before being used. With this factor eliminated together with the correction as to the apparent error in computing the factor of operating income, we have the following result:

Traffic units	1.58
Rolling stock	1.65
Operating Revenues	1.79
Total	5.02

This total divided by three as the average of the three factors, gives a result of 1.673%, which as applied to the

total valuation of plaintiff's property of $375,285,902.00 makes a valuation for the State of Wyoming of $6,278,-[fol. 44] 534.14, or a reduction over the valuation used by the State Board and certified to the taxing units of the several counties of $1,602,468.90, which latter amount if the first reasoning be correct, represents a substantial overvaluation so as to entitle plaintiff to relief.

Inasmuch as it would seem to be the function of a court of equity to determine the entire matter before it with respect to securing equality as far as may be to the complaining taxpayer (Green v. Louis & Interurban, 244 U. S. 499), the finding of this court will be that the State Board of Equalization by adopting the mileage percentage as a factor in the determination of the value of plaintiff's property in Wyoming, used an erroneous, improper, unequal and arbitrary basis for its computation and that the value of said property by the use of all the legitimate factors which have been presented to the court, should be, as before stated, $6,278,534.14. Th- distribution of this amount in values among the several counties of which the defendants are the representatives as tax collectors, will be ratified and approved, the appropriate figures for which may be computed and caried into the decree. As to all taxes upon valuation exceeding the above amount, the defendants will be permanently restrained and enjoined from collecting the same, and as to all other taxes, the temporary injunction will be dissolved.

Findings, conclusion and a decree may be prepared through collaboration of counsel and submitted to the court on or before December 5, 1932, awarding costs to the plaintiff and reserving proper exceptions to the parties.

In United States District Court

Findings of Fact, Conclusions of Law and Decree—Filed Dec. 17, 1932

The above entitled cause came on to be heard and tried at the November, 1931, term of this court on the 21st day of March, 1932, and evidence having been submitted on behalf of complainant and on behalf of defendants, and plaintiff and defendants having rested, and briefs having been

filed, submitted and examined by the court, and said cause having been taken under advisement until this day, the court now makes the following findings of fact:

[fol. 45] FINDINGS OF FACT

1. Plaintiff is now and for many years last past has been a corporation organized and existing under and by virtue of the law, and a citizen, of the State of Illinois.

2. Defendants, Thomas C. Rowley, Charles T. Cole, Alta Pearl Massee, and D. A. Shoopman, are now, were at the time of the commencement of this case, and ever since have been, the duly elected, qualified and acting county treasurers, respectively, of the counties of Converse, Fremont, Natrona and Niobrara, in the State of Wyoming.

3. The amount involved in this cause, exclusive of costs and interest, exceeds the sum of $3,000.00 as to each of the defendants.

4. The Wyoming State Board of Equalization after protest and hearing by the plaintiff made its finding and order on or about the 14th day of July, 1931, whereby it placed a valuation for tax purposes upon the property of the plaintiff located in the State of Wyoming, and subject to valuation by the said State Board of Equalization of $7,881,-003.94.

5. Plaintiff owns and operates a railway system in the States of Illinois, Wisconsin, Minnesota, South Dakota, Iowa, Nebraska, Michigan, North Dakota and Wyoming, and has and operates as a part of its system property located in the counties of Niobrara, Converse, Natrona and Fremont, in the State of Wyoming, there being 8,180.20 miles of main line track in plaintiff's entire system, of which 278.35 miles is located in the State of Wyoming; and that the quantity, quality, cost and value of plaintiff's property located within the State of Wyoming, measured upon the basis of miles of main line track, is greatly less than throughout its system, which fact was well known to the State Board of Equalization when it placed the aforesaid valuation on plaintiff's property. To which finding defendants now and at the time duly excepted.

6. Of the 278.35 miles of plaintiff's main line track in Wyoming, 71.24 miles are in Converse County, 76.86 miles

are in Fremont County, 85.35 miles are in Natrona County, and 44.90 miles are in Niobrara County.

7. In arriving at the aforesaid valuation of $7,881,003.94, [fol. 46] as representing the value of plaintiff's property in the State of Wyoming, the said State Board of Equalization having determined the value of plaintiff's entire operating property, not including non-operating property locally assessed, to be $375,285,903.00, adopted and used as a factor the percentage of plaintiff's main line track located in the State of Wyoming, to-wit, 3.29%, without taking into account the fact that plaintiff's property in the State of Wyoming, measured on a mileage basis, is and was greatly less in quantity, quality, cost and value than the portion of its operating system located outside the State of Wyoming. To which finding defendants now and at the time duly excepted.

8. In arriving at the aforesaid value the State Board of Equalization used as a factor the average of the percentage of gross and net income of the plaintiff within the State of Wyoming, and in making its computations used the figure 1.89%, whereas the figure correctly representing the average percentage of the company's gross and net income within the state of Wyoming is 1.79%.

9. The evidence submitted by the plaintiff upon the question of discrimination is not sufficient to show that there was an intentional and systematic undervaluation of property generally throughout the State of Wyoming or throughout the aforesaid counties, or that there was any intentional omission from the tax rolls of a considerable amount of property. To which finding defendants now and at the time duly excepted, and to which finding the plaintiff now excepts and at the time excepted.

10. That the State Board of Equalization, previous to the commencement of this action, certified the aforesaid valuation of $7,881,003.94, to the County assessor of the aforesaid counties, and apportioned the same to the said counties as follows:

To Converse County	$2,017,039.00;
To Fremont County	$2,176,159.00;
To Natrona County	$2,416,339.00;
To Niobrara County	$1,271,267.00.

which said respective valuations were spread upon the assessment rolls of said respective counties, and by them certified to the defendant county treasurer for collection, upon [fol. 47] which valuations taxes were levied in said respective counties upon the property of the plaintiff located therein as follows:

In Converse County	$40,042.27;
In Fremont County	$48,223.02;
In Natrona County	$47,701.82;
In Niobrara County	$32,639.01.

the collection of which by distraint of plaintiff's property was threatened by said respective county collectors up to the time of the commencement of this action.

Conclusions of Law

Upon the aforesaid findings of fact the court makes the following conclusions of law:

1. Plaintiff has no adequate remedy at law. To which conclusions the defendants now and at the time duly excepted.

2. This court has jurisdiction of this cause on the equity side, and has jurisdiction to grant the equity relief prayed for in plaintiff's bill of complaint. To which conclusions the defendants now and at the time duly excepted.

3. That the use of the percentage of plaintiff's main line track located in the State of Wyoming of its whole main line track, without taking into account the difference in the character, quantity, quality, cost and value of plaintiff's Wyoming property, as compared with its property throughout its system, and the use of said percentage, as a factor in determining the value of plaintiff's property located in the State of Wyoming and subject to valuation by the said board, constituted and constitutes an arbitrary and unreasonable method, and the application of a wholly wrong method and principle of determining the value of plaintiff's property in the State of Wyoming. To which conclusion the defendants now and at the time duly excepted.

4. That the plaintiff's traffic units within the State of Wyoming are 1.58% of the whole; that its rolling stock used in the State of Wyoming is 1.65% of the whole; that its

operating revenue in the State of Wyoming is 1.79% of the whole; that the average of these three factors is 1.673%, which, applied to the total valuation of plaintiff's property [fol. 48] of $375,285,902, makes a valuation of plaintiff's operating property in the State of Wyoming and subject to valuation by said Board, of and amounting to $6,278,534.14, which the court finds to be the true actual value of plaintiff's said property in the State of Wyoming, and which is $1,602,468.90 less than the valuation placed on plaintiff's said property in the State of Wyoming by said State Board of Equalization; and that plaintiff's said property in the State of Wyoming was substantially and aribtrarily overvalued by the said State Board of Equalization. To which conclusions the defendants now and at the time duly excepted.

5. That the true actual value of plaintiff's said property in said respective counties in the year 1931 was as follows: Converse County, $1,606,908, Fremont County, $1,733,674, Natrona County, $1,925,177, and Niobrara County, $1,012,-776; that the total taxes legally assessable for said year upon the valuations aforesaid in the said respective counties are as follows: Converse County, $31,900.34, Fremont County, $38,417.71, Natrona County, $38,002.48, and Niobrara County, $26,002.40; that the amounts of taxes already paid by the plaintiff at the commencement of this suit in the said respective counties are as follows: Converse County, $24,025.36, Fremont County, $28,933.82, Natrona County, $28,621.09, and Niobrara County, $19,583.40; and that the amounts due to the said respective counties from the plaintiff for 1931 taxes upon the total valuation fixed by the court and allocated to the said respective counties are the following, and no more, to-wit: Converse County, $7,874.98, Fremont County, $9,483.89, Natrona County, $9,381.59, and Niobrara County, 6,419.00. To each of which findings and conclusions defendants now and at the time duly excepted.

Decree

It Is Therefore Considered, Ordered, Adjudged and Decreed by the Court that on or before the 31st day of December, 1932, the plaintiff pay to the Treasurer of Converse County the sum of $7,874.98, and to the Treasurer of Fremont County, the sum of $9,483.89, and to the Treasurer of

Niobrara County, the sum of $6,419.00, and to the Treasurer of Natrona County, the sum of $9,381.39, and that the defendants, and each of them, be, and they are hereby permanently enjoined from collecting or attempting to collect any sums as taxes for the year 1931 upon property of the [fol. 49] plaintiff valued by the State Board of Equalization excepting the sums last mentioned. To which decree and order of the court, and to each matter therein, the defendants now and at the time duly excepted.

It is further ordered, adjudged and decreed by the Court that each of the defendants pay to the plaintiff one-quarter of all plaintiff's costs herein, the same to be taxed by the clerk of this court. To which order and decree the defendants at the time duly excepted.

Done in Open Court this 17th day of December, 1932.

By the Court:

T. Blake Kennedy, Judge.

O. K. as to form:

George W. Ferguson, Asst. Atty. General. R. R. Rose, Atty. for Pltff.

IN UNITED STATES DISTRICT COURT

Statement of Evidence—Lodged with Clerk, March 13, 1933; Filed April 24, 1933

The following is appellants' condensed statement in narrative form of the evidence given upon the trial of said cause, made pursuant to Equity Rule Number 75 (b), and lodged in the clerk's office for examination by plaintiff, as provided by said rule.

Thereupon plaintiff's Exhibit A was introduced in evidence, being a copy of the order of the State Board of Equalization fixing the value of the property of plaintiff for taxation in the State of Wyoming for the year 1931. A copy of the same is as follows:

PLAINTIFF'S EXHIBIT "A"

Before the State Board of Equalization of Wyoming

In the Matter of the Valuation for Assessment Purposes of the Chicago & North Western Railway Company

Order

On the 9th day of July, 1931, the representatives of the Chicago & North Western Railway Company appeared before the State Board of Equalization in protest to the tentative value placed upon their property in the State of [fol. 50] Wyoming for taxation purposes for the year 1931, to wit: $7,989,587.00.

These representatives submitted, among other matters, statistical calculations for the purpose of proving that the property of this Railway in Wyoming should be assessed at not more than $5,849,570.00.

The method by which they arrived at this figure was as follows:

Taking the average of the five preceding years of the market value of their "stocks and bonds" for one factor and the average of the five preceding years of the "Net Corporate Income from Railway Operations Capitalized at 6% for the other factor in arriving at the value of the entire System,

the average of the first factor being		$385,800,085
the average of the second factor being		364,771,720
divided by 2	2)	750,571,805
giving a value for the System of		$375,285,902

The State Board of Equalization has no objection to accepting this amount as the reasonable value of their Railway Operating Property, but the State Board of Equalization objects to the method used by the Railway representatives in arriving at the allocation of a percentage of 1.56 of this total value for the State of Wyoming, the objections being based on the following grounds:

That the following factors as used by the Railway representatives namely the five-year averages of the "Traffic Units," "Operating Revenue" and use of "Rolling Stock" does not represent a fair way of arriving at the percentage that should be allocated to Wyoming.

To explain why these factors should not be used by themselves in arriving at a fair percentage it will be necessary to remember that the Chicago & North Western Railway has no Western outlet, hence is in reality a branch line whilst in Wyoming; therefore, to take "Traffic Units" and use of "Rolling Stock" as two of the three factors in deciding what percentage of the whole should be allocated to Wyoming is manifestly unfair to the State as this State derives no benefits from overhead traffic whilst contribut-
[fol. 51] ing its share of such traffic for the benefit of other states. "Operating Revenues" should be substituted by "Net Operating Revenues" if it is to be used as a factor for it is the "Net Operating Revenues" that help to make a success of any undertaking, whilst "Operating Revenues" might be totally offset by "Operating Expenses."

We might, with equal propriety, insist that the percentage to be allocated to Wyoming should be those only which were favorable to the State as to accept those only submitted by the Railway representatives which naturally are the ones that are favorable to that property owner.

Admitting that the financial conditions of the Railway are not as favorable as in the past, this condition is also true of many of the other taxpayers in the State and whatever influence this might have, in our wish to relieve the tax burden, one cannot lose sight of the fact that it is the duty of this Board, under the statutory requirement for valuations for taxation purposes, to equalize as nearly as possible, the tax burden according to the value of the amount of property each taxpayer has.

If we accept the factors "Traffic Units" and "Use of "Rolling Stock" we contend that we are entitled to the percentage of the mileage of the road to offset the unfavorable conditions governing these two factors in Wyoming in this particular instance.

We also find that instead of using the "Operating Revenues" as a factor that it should be the "Net Operating Revenues."

This gives us the following factors:

Traffic Units	1.58%
Use of Rolling Stock, as per evidence	1.65%
Net Operating Revenues	1.89%
Percentage of Miles of Railway in Wyoming	3.29%
Divided by 4	8.41%
Percentage to be allocated to Wyoming	2.10%

All percentages are based on a five-year average.

Five-year average of Value of Railway $375,285,902

$375,285,902×2.10%=$7,881,003.94.

$7,881,003.94—Equalized Wyoming portion of value for taxation purposes.

[fol. 52] Many other factors could with equal propriety be used which naturally would affect the final results by increasing the value but we have endeavored to follow the lines as suggested by the Railway representatives and use factors that might reasonably be deemed as directly bearing on the true value of the property.

Wherefore It Is Ordered, that the valuation of said property for taxation purposes for the year 1931 be and the same is fixed as of the value of $7,881,003.94.

Dated at Cheyenne, Wyoming, this 14th day of July, A. D. 1931.

State Board of Equalization, by F. Chatterton, Chairman; C. H. McWhinnie, Member; B. B. Morton, Member. (Seal.)

Attest:

W. J. Taylor, Secretary.

C. F. Balch, a witness on behalf of plaintiff, testified:

Direct examination.

I reside in Evanston, Illinois, I am employed by the Chicago and North Western Railway as its statistician in the office of the president. I have been so employed a little over eight years. Prior to that, I was Assistant General Auditor having charge of the revenue and car accounts for

three years. Prior to that, I had the title of statistician in the accounting department for ten years. I have been employed in the accounting work proper for about forty years. I was in the service of the Interstate Commerce Commission as an examiner of accounts from September, 1907 to August, 1910. I had a senior rank and credential No. 6; that is, I was sixth out of eighty-five men when I entered the service. As statistician of the plaintiff, I have access to all of the accounts of the company, and my peculiar duties are to make up such statistics and data as are necessary in our rate hearings and hearings of this character and in presenting the accounting data with reference to most of our legal and rate cases. Aside from that, I am at the service of the president for any statistical or special service that he requires. These statistics, which I have prepared in connection with the present hearings, have been gathered from the records of the company. [fol. 53] These records are throughout all of the accounting department offices and are stored in a large warehouse at Ravenwood. They could not be produced in court with any measure of convenience. The data I have involved probably several carloads of records.

The system value of the Chicago and North Western Railway Company was arrived at by taking the market value of the stocks and bonds, from that deducting the non-operating property, arriving at the market value of the railway property itself, as one method. As the other method, by taking the known railway operating income and capitalizing it at six (6) per cent, combining and getting the average of the two, then allocating this to the several states. These two methods are in common use by the North Western Railway Company. They are not used in Minnesota because they tax on a gross earning basis. The method I have mentioned for arriving at system value is used by the company in all of the nine states in which it operates. It has been so used for over ten years. It is used by other operating carriers. The market value of the entire line was arrived at by taking the high and the low quotations of each separate issue of securities for each of the twelve months of the year, adding them together and dividing by the number of quotations. Sometimes there are not sales in all of the twelve months. We may have twenty quotations in a year and have to average the twenty. Otherwise

it is an average of all of the quotations that are published and that are collected for each issue of securities and that average price over the time is used to extend and ascertain the value. The average value for the five-year period ending December, 1930, was $385,800,085—that represents the market value of the railway operating property only.

(Thereupon were introduced plaintiff's Exhibits B, B-1, B-2, B-3, B-4 and C, containing detailed enumeration of and statistics as to the value of plaintiff's stocks and bonds, together with its corporate assets not used in the operation of its railway, for the years, 1926, 1927, 1928, 1929 and 1930. From these exhibits, the witness testified as to their value.)

Based on the market value of plaintiff's stocks and bonds, its railway operating property, not including non-operating property locally assessed, was valued at $342,767,-[fol. 54] 737.00 for the year 1926; $398,490,108.00 for the year 1927; $397,772,006.00 for the year 1928; $398,555,-050.00 for the year 1929; and $391,415,526.00 for the year 1930.

(Thereupon was introduced plaintiff's Exhibit D, a statistical table itemizing the revenue and expenses of plaintiff in operating its railway showing its operating (gross) revenues for the year 1926 to be $154,335,724.00; 1927, $150,132,960.00; 1928, $152,089,755.00; 1929, $154,732,-947.00; 1930, $130,030,474.00;—Net Revenue from Railway Operations for the year 1926 to be $33,747,341.00; 1927, $33,138,693.00; 1928, $35,450,847.00; 1929, $39,446,907.00; 1930, $28,939,050.00;—Net Operating Income for the year 1926 to be $22,295,139.00; 1927, $20,257,694.00; 1928, $23,-225,683.00; 1929, $26,220,149.00; 1930, $17,432,851.00.)

By deducting tax accruals, uncollectible railway revenues, equipment and joint facility rents from the net operating revenue is obtained what is called the net railway operating income.

(Thereupon was introduced plaintiff's Exhibit E, showing the value of plaintiff's operating railway property based on its net railway operating income capitalized at six (6) per cent for a five-year period to be for the year 1926, $371,585,653; 1927, $337,628,225; 1928, $387,094,715;

1929, $437,002,491; 1930, $290,547,515;—and an average for the five years of $364,771,720.)

The average value of the stocks and bonds and the capitalized average income over a period of five years discloses the average value of the entire operating system of the Chicago and North Western Railway to be $375,285,903.00, which is the value taken by the State Board of Equalization with the exception that they dropped $1.00.

(Thereupon were introduced plaintiff's Exhibits F and F-1, F-2, F-3, F-4 and F-5, showing the percentage of traffic units, use of rolling stock and train miles of plaintiff in the states in which it operates, for a five-year period:

[fol. 55]

State	Traffic Units—Ratios 1930	1929	1928	1927	1926	Use of Rolling Stock—Ratios 1930	1929	1928	1927	1926
Ill	29.03%	29.19%	28.84%	28.00%	27.69%)	27.86%	28.14%	27.95%	27.12%	27.58%
Wis	25.81%	26.87%	26.90%	27.03%	27.96%)	24.06%	25.14%	24.65%	24.86%	25.16%
Mich	4.65%	5.56%	5.00%	5.35%	5.64%)	2.98%	3.33%	3.08%	3.21%	3.37%
Minn	3.79%	3.10%	3.26%	3.19%	2.84%)	3.88%	3.61%	3.74%	3.71%	3.70%
Iowa	24.84%	24.33%	24.33%	23.42%	23.59%)	27.23%	26.30%	26.59%	25.74%	25.21%
N. Dak.	.04%	.03%	.03%	.03%	.03%)	.04%	.03%	.04%	.04%	.04%
S. Dak	4.28%	3.71%	3.98%	4.00%	3.70%)	4.98%	4.71%	4.85%	5.01%	4.82%
Nebr.	6.14%	5.78%	6.13%	7.17%	6.85%)	7.43%	7.23%	7.52%	8.46%	8.39%
Wyo.	1.42%	1.43%	1.53%	1.81%	1.70%)	1.54	1.51%	1.58%	1.85%	1.73%

State	Railway Operating Revenue—Ratios 1930	1929	1928	1927	1926	State	Train Miles—Ratios 1930	1929	1928	1927	192
Ill	28.58%	28.77%	28.72%	28.14%	27.01%	Ill	25.28%	25.18%	24.93%	24.38%	24.78%
Wis	27.51%	28.95%	28.87%	29.27%	30.28%	Wis	25.25%	26.19%	26.17%	26.15%	26.05%
Mich	3.67%	4.14%	3.78%	3.99%	4.35%	Mich	2.85%	3.04%	2.91%	2.90%	3.08%
Minn	3.51%	3.08%	3.13%	3.23%	3.04%	Minn	4.72%	4.57%	4.65%	4.66%	4.65%
Iowa	22.66%	22.00%	21.81%	21.23%	21.22%	Iowa	25.17%	24.53%	24.18%	23.88%	23.69%
N. Dak.	.03%	.03%	.03%	.03%	.03%	N. Dak.	.06%	.05%	.05%	.06%	.05%
S. Dak.	4.79%	4.42%	4.62%	4.55%	4.57%	S. Dak.	6.98%	6.71%	6.97%	7.13%	6.75%
Nebr.	7.79%	7.21%	7.57%	8.04%	8.03%	Nebr.	8.30%	8.33%	8.65%	9.19%	9.35%
Wyo.	1.46%	1.40%	1.47%	1.52%	1.47%	Wyo.	1.39%	1.40%	1.49%	1.65%	1.60%

[fol. 56] Traffic units are arrived at by adding together the transportation of passengers for one mile per passenger plus the transportation of freight per miles tons. Operating revenue, is the gross revenue. Rolling stock represents the book value of all the cars and locomotives of plaintiff. These have been reported not only for the entire line but have been computed for each separate state served by the plaintiff. These three factors are based upon the use of the property in the different states as indicating value.

Traffic units represent the amount of passengers and the gross amount of freight in each state; that is to say, the units measured in passenger miles for passenger service. Railway property consists of a certain amount of fixed property, tracks, buildings, etc., which can be allocated in each state and then in addition to that, there is the rolling stock, passenger cars, freight cars, locomotives and work equipment which is constantly floating throughout all of the system wherever it operates. A record is kept of the number of miles that each locomotive, freight car and passenger car travels during the year. We compute the miles that each locomotive, freight car and passenger car travels in each state and from this information, we are able to allocate these costs.

My testimony has now covered all of the allocating factors that were used in the report made to the State Board of Equalization in the last five years. I have not used any other allocating factors. There are other allocating factors in determining or attempting to arrive at the value or percentage of value in a particular jurisdiction by other roads, or that have been used in the past. One of these is transportation train miles. Transportation train miles, the miles of all tracks and the miles of main track are the three factors which have more or less recognition, according to the circumstances and appropriateness among railroads.

Plaintiff has not used train miles as a factor. If it had used that factor, it would have lowered the value of its property in Wyoming. Transportation train mile is a train run one mile—whether it is passenger, freight, mixed or special service, regardless of the number of cars or character of the engine or the amount of freight or the revenue or the use of rolling stock.

The average of the three allocating factors used by the [fols. 57 & 58] plaintiff last year was 1.473, and the transportation train mile factor was 1.39.

The factor, transportation train miles, is not properly usable for the reason that train miles do not have uniform characteristics in the several states. A train does not have the same number of cars, does not transport the same number of tons, and the revenues are different. In other words, if a train consisting of an engine and a caboose is hauled one mile, that would be called a transportation train mile, and the train consisting of two engines and sixty freight cars, all loaded, transported one mile would make a train mile.

All the elements that enter into the transportation train mile have been taken into account in the use of the rolling stock factor and the traffic unit factor.

The factors used by plaintiff for allocating are the same in all states. A ton is a ton everywhere and a mile is a mile everywhere, and in the use of rolling stock, a car is a car everywhere, and an engine is the same, but in the use of a train mile, the characteristics are different in all of the different states and conspicuously so with reference to the size of the train.

The number of miles in the entire system of plaintiff for the year 1930 was 8,458.52, and the number of miles operated in Wyoming was 278.35, which is 3.29% of the system. The number of miles of track in Wyoming has not changed during the past five years.

The information contained on plaintiff's exhibit F was all furnished to the State Board of Equalization at the hearing in the summer of 1931, and the information contained in plaintiff's Exhibits F-2, F-3, F-4 and F-5 was also presented to the Board by the plaintiff at the same time.

(Thereupon was introduced plaintiff's Exhibit G, which follows in full.)

[fols. 59 & 60]

Plaintiff's Exhibit "G"

Chicago and North Western Railway Company

Assignment of Property Values to State of Wyoming

	Year	Value of entire line as represented by market values of stocks and bonds (1)	Assigned to State of Wyoming on basis of			
			Traffic units (2)	Operating revenues (3)	Use of rolling stock (4)	Average of 3 bases (5)
1	1926	$ 342,767,737	$ 5,827,052	$ 5,038,686	$ 5,929,882	$ 5,598,540
2	1927	398,490,108	7,212,671	6,057,050	7,372,067	6,880,596
3	1928	397,772,006	6,085,912	5,847,248	6,284,798	6,072,653
4	1929	398,555,050	5,699,337	5,579,771	6,018,181	5,765,763
5	1930	391,415,526	5,558,100	5,714,667	6,027,799	5,766,855
6	Aggregate	$1,929,000,427	$30,383,072	$28,237,422	$31,632,727	$30,084,407
7	Aver. 5 Yrs.	$ 385,800,085	$ 6,076,614	$ 5,647,484	$ 6,326,545	$ 6,016,881

	Year	Value of entire line as represented by income capitalized at 6%	Assigned to State of Wyoming on basis of			
			Traffic units	Operating revenues	Use of rolling stock	Average of 3 bases
8	1926	$ 371,585,653	$ 6,316,956	$ 5,462,309	$ 6,428,432	$ 6,069,232
9	1927	337,628,225	6,111,071	5,131,949	6,246,122	5,829,714
10	1928	387,094,715	5,922,549	5,690,293	6,116,096	5,009,646
11	1929	437,002,491	6,249,136	6,118,035	6,598,738	6,321,970
12	1930	290,547,517	4,125,775	4,241,994	4,474,432	4,280,734
13	Aggregate	$1,823,858,601	$28,725,487	$26,644,580	$29,863,820	$28,411,296
14	Aver. 5 Yrs.	$ 364,771,720	$ 5,745,097	$ 5,328,916	$ 5,972,764	$ 5,682,259
	Ratio used	Entire line	State of Wyoming			
15	1926	100.00%	1.70%	1.47%	1.73%	
16	1927	100.00%	1.81%	1.52%	1.85%	
17	1928	100.00%	1.53%	1.47%	1.58%	
18	1929	100.00%	1.43%	1.40%	1.51%	
19	1930	100.00%	1.42%	1.46%	1.54%	

		Miles of road	Per mile of road	
20	Average for 1930 only	278.35	$18,085	$ 5,023,795
21	Average for Five Years	278.35	$21,015	$ 5,849,570

[fol. 61] Exhibit G shows all of the figures used in making the computation of the entire line values to the State of Wyoming, both as to market value of stocks and bonds and as to the capitalized income. It is the application to the Wyoming property of the factors that I have testified to. Column 1 is the value of the railway operating property of the entire line as represented by the market value of the stocks and bonds for the years 1926 to 1930, inclusive, showing the average value for the five years to be $385,800,085.00. In columns 2, 3 and 4 appears the allocation to the State of Wyoming on three different bases for the year 1930. You will find on line 19 that the proportion of the traffic units in Wyoming is 1.42%. Applying this 1.42 to the amount, $391,415,526, we arrive at a value in Wyoming as shown on line 5, column 2, of $5,558,100. In the third column we have a computation arrived at by multiplying the 391 million plus by 1.46 the percentage of operating revenue in the State of Wyoming, as shown on line 19, which makes a value in Wyoming of $5,714,667.

The next column shows the value of the use of the rolling stock multiplying the 391 million by the percentage of 1.54, on line 19, giving the value in Wyoming of $6,027,799, as representing the value by rolling stock use in the state.

By adding the three together, columns 2, 3 and 4 and dividing by 3, I arrive at an average of these three allocations, which gives for the year 1930, $5,766,855.00.

Lines 1, 2, 3 and 4 give exactly the same information for the years as indicated. I arrive at the figures in line 7 by adding the five preceding amounts together and dividing by 5 which produces an average of the three allocations for the five years, or the average value of the system on a basis of stocks and bonds so that I have the value over a period of five years, allocated by the three factors I have described, as the sum of $6,016,881.

On the second section of this exhibit is an application of the same percentage to the net revenue operating income in the same way and gives the value of the property in Wyoming on that basis as $5,682,259, which is the value as reflected by the five year figures based upon capitalized income and by the use of the three allocating factors that I have described.

On line 20 is a combination for the year 1930—taking the [fol. 62] figure in line 5, in column 5, for Wyoming, and

adding to it the figure in line 12, column 5, and dividing by 2. In other words, that is the average by taking the Wyoming value upon the basis of stocks and bonds with the allocating factors and adding to the value of the Wyoming property arrived at by consideration of the capitalized income allocated by the allocating factors and dividing by 2, and you get the figure of $5,023,795, as representing the value of the property by both methods, and by all allocating factors for the year 1930. By doing the same thing for the five year period, I get $5,849,570, which represents the value of the property of the plaintiff in the State of Wyoming allocated by these methods applied to these two bases of system values. This value was claimed as 100% value by plaintiff in its report to the Board of Equalization for the year 1931, to be equalized.

(Thereupon was introduced plaintiff's Exhibit H-2 showing amount of property of entire line of plaintiff and proportion thereof in Wyoming on the basis of the I. C. C. appraisal, and which follows in full:

PLAINTIFF'S EXHIBIT H-2

Chicago and North Western Railway Company

Amount of Property of Entire Line and Proportion in Wyoming On Basis of I. C. C. Appraisal

Year	Amount of property as appraised by I. C. C. adjusted to December 31	Amount of property in Wyoming	Ratio of property in Wyoming to entire line
(1)	(2)	(3)	(4)
1926.....	$ 607,518,804	$11,533,381	1.91%
1927.....	626,279,174	11,975,638	1.84%
1928.....	637,440,049	11,745,635	1.80%
1929.....	658,298,388	11,859,983	1.80%
1930.....	669,198,216	11,724,126	1.75%
Total.....	$3,198,734,631	$58,838,763	1.84%
Average.....	$ 639,746,926	$11,767,752	1.84%

[fol. 63] This exhibit is to show the figures for the appraisal made by the Appraisal Bureau of the Interstate Commerce Commission of the property of the North Western Railway. The appraisal was based upon cost, not value.

The figures in Column No. 2 were arrived at by taking the appraisal of the Interstate Commerce Commission made June 30, 1917, at which time they fixed a final value of the property of the C. & N. W. Railway, and adding to it the net additions to the property for each year since that appraisal was arrived at. The figures are adjusted to December 31st and show the amount of property of the company at the end of 1930 to be $669,198,216.00 and the amount of property in Wyoming to be $11,724,126.00. In other words, 1.75% of the company's property is located in Wyoming. The exhibit shows that the average amount of company property throughout the system for the years 1926 to 1930 is $639,746,926.00; that the average amount of property in Wyoming for those years is $11,767,752.00, and that 1.84% of the company property based on the I. C. C. appraisal for an average of the five years was located in Wyoming."

(Thereupon was introduced plaintiff's Exhibit H-4, which follows in full.)

PLAINTIFF'S EXHIBIT "H-4"

"Chicago and North Western Railway Company

Value of Entire Line as adopted by Wyoming Board of Equalization	$375,285,902.00
Portion of same located in Wyoming as computed by I. C. C. plus additions to December 31, 1930 (5 year average)	1.84%
Value of Taxable Property in Wyoming as so determined	6,905,260.00
Value Claimed by C. &. N. W. Ry. Co. (5 Year average)	5,849,570.00
Property on I. C. C. basis exceeds that Computed by C. & N. W. Ry. By	1,055,690.00
Amount of Assessment	7,881,003.94
Wyoming Assessment exceeds Value on I. C. C. basis by	975,743.94"

By using the average percentage which the appraisal by the I. C. C. shows, 1.84%, it is shown that the Wyoming assessment exceeds the value on I. C. C. basis by $975,-743.94.

[fol. 64] (Thereupon was introduced plaintiff's Exhibit I.)

Exhibit I is a statement showing what we class as statistics of operation per mile of road in each of the different states served by the Chicago and North Western Railway. It shows the earnings per mile of road in each state, the traffic density of freight traffic measured by the tons one mile in each state, the passenger density measured by the passengers one mile in each state, and the two combined, and then the amount of rolling stock per mile of road. This exhibit relates entirely to the year 1930. The operating revenue in Illinois for 1930 was $44,932 per mile; in Wisconsin it was $16,498; in Wyoming it was $6,844. The average of the entire line was $15,373 per mile in the year 1930. The average for all of the states excepting Wyoming was $15,663. The earnings per mile in Wyoming were 44.52% of the average earnings per mile of the entire line. In other words, a mile of road in Wyoming earned 44.52% of the average mile of road throughout the system. It required 2¼ miles of road in Wyoming to earn as much as one average mile of the entire system. It required 2.29 miles of road in Wyoming to earn as much as one mile of road in the other eight states, based upon operating revenue valuations.

By the same computation, on the basis of freight traffic units, which is called freight traffic density, the average throughout the system was 895,012 tons one mile per mile of road. In Wyoming the average was 420,687, and for the entire system, excluding Wyoming, it was 911,152. Every mile of road in Wyoming handled 48.12% as much traffic as the average mile of the system. It required 2.13 miles of road in Wyoming to handle as much traffic as the average mile of the entire system. It required 2.17 miles of road in Wyoming to handle as much freight traffic as the average of the other eight states.

The average passenger units throughout the system for that year was 98,411. In Wyoming the average was 6,673. The average for the whole road, excluding Wyoming, was 101,532. The average mile of road in Wyoming carried 6.77% of the average amount of passenger traffic, as averaged for the entire line. It required 14.75 miles of road in Wyoming to carry as many passengers one mile as were carried by the average mile of road of the plaintiff. It re-

[fol. 65] quired 15.22 miles of road in Wyoming to carry the same number of passengers per mile as were carried per mile in all of the other eight states.

The average of the combined freight and passenger traffic units per mile was 993,423 and in Wyoming the average was 427,360. The average for the entire system, excluding Wyoming, was 1,012,684. The percentage of the combined average for Wyoming was 43.02%. It required 2.325 miles of road in Wyoming to handle as many traffic units as the average mile of road of the entire line of plaintiff.

The average of rolling stock use for the entire line per mile of road was 15,107. The average for Wyoming was 7,060. The average for the eight states other than Wyoming, was 15,380. The rolling stock per mile of road used in Wyoming was 46.73% of that of the whole system. There was the same amount of rolling stock used on 2.14 miles of road in Wyoming as on the average mile of the system. There was as much rolling stock used on 2.18 miles or road in Wyoming as on the average mile of road in the other eight states.

(Thereupon was introduced plaintiff's Exhibit J-1 which follows in full).

PLAINTIFF'S EXHIBIT "J-1"

Chicago and North Western Railway Company

Value of Railway Operating Property in Wyoming

On basis of $375,285,902 as computed by the State of Wyoming as the value of the Entire Line and apportioned to the State on basis of miles of Road

Entire Line

Value of Entire Line	$375,285,902
Miles of Road Operated 8,458.55.	
Average Value per Mile of Road (Entire Line)	44,368

State of Wyoming on Basis of 1930 Only

The miles of Road in Wyoming collectively are worth, per Mile:

(a) 44.52% of average on basis of Operating Revenue	19,753
(b) 43.02% of average on basis of Traffic Units	19,087
(c) 46.73% of average on basis of Rolling Stock	20,733
[fol. 66] (d) Sum of (a), (b) and (c)	59,573
(e) Average of Three, representing the value per mile of Road in Wyoming, properly computed	$19,858

Aggregate Value in Wyoming

On bases of assignment to State $19,858 x 278.35 miles	$5,527,474

Statistician, December 24, 1931.

On Exhibit J-1, I have computed the value in Wyoming by taking the miles of road in Wyoming and giving consideration to the characteristics of a mile of road in Wyoming, as shown on Exhibit I, which exhibit was for the year 1930. This exhibit shows that a mile of road in Wyoming, based on operating revenue, was worth $19,753; based on traffic units was worth $19,087; based on rolling stock was worth $20,733; an average of $19,858, and a total of $5,527,474.

The use of the rolling stock factor produces a higher value than three of the other factors used throughout these figures.

(Thereupon was introduced plaintiff's Exhibit J-3, showing the same data as Exhibit J-1 on a five year basis for the State of Wyoming ending December 31, 1930. The average for the entire line per mile as shown by the exhibit is $44,368.00. For Wyoming, based on operating revenue per mile the value is shown to be $21,306.00; based on traffic units the value is shown to be $19,691.00; based on rolling stock the value is shown to be $22,073.00. The average of the three factors shows the value of the company's property in Wyoming to be $21,024.00 per mile or an aggregate value of the company's property in Wyoming amounting to $5,852,030.00.)

(Thereupon was introduced plaintiff's Exhibit K).

Exhibit K deals with the transportation train miles. It is a comparison of the ratios in the State of Wyoming used by me in making up the exhibits which were presented to the Board at the hearing in 1931 showing for the five years (1926-1930) the different percentage ratios in Wyoming and the average of the three (factors used by the company in determining the value of its property in Wyoming) as compared with the percentage relation of the transportation train miles. The comparison shows that while the average traffic units in Wyoming for the five years is [fol. 67] 1.58%, the average transportation train miles for the same period is 1.51%, and that while the traffic units in 1930 in Wyoming was 1.42%, the transportation train miles in that year were only 1.39%. The average operating revenues in Wyoming for the five year period was 1.46% and the average transportation train miles was 151%. The use of rolling stock for the five year period was 1.64% as compared with 1.51% for transportation train miles. The average of the three factors used is 1.56% as compared with 1.51% representing transportation train miles.

(Thereupon was introduced plaintiff's Exhibit K-3, being a chart showing the operating revenue per mile of road of plaintiff.)

Exhibit K-3 shows the states traversed by the Chicago and North Western Railway, the miles of road operated in each state, railway operating income in each state, and the operating income per mile of road for the year 1930.

The three states of Minnesota, North Dakota and South Dakota showed a net operating income loss for 1930. The fact that there were three states, and that they may be at any time others, where there is a net operating income loss, practically prohibits its use as an allocating factor for the reason that to use net operating income here as a factor would determine that the road's property in the three states of South Dakota, North Dakota and Minnesota was worth less than nothing, and there is a great inequality between the states with the net per mile of road varying from $7,586 in Illinois, down to a loss of $1,876 in North Dakota, as compared with the average for the entire line of $2,061. There is no uniformity in this as a unit of measure. On the other hand, gross operating revenue represents the use of the property, whereas the net

operating revenue would indicate there was no use made of the property in those three states.

The value per mile of plaintiff's road was fixed in Wyoming for the year 1931 at $28,313, and for the year 1930 was fixed at $28,636 per mile of road. I think the average for the last five years was $28,678 per mile.

(Thereupon was introduced plaintiff's Exhibit L, which is as follows:)

[fol. 68]

PLAINTIFF'S EXHIBIT "L"

Chicago and North Western Railway Company

Statement of Ratios of Performance Units and Units of Property in Each State to the Entire Line for the Year Ended December 31st, 1930

	Wis.	Ill.	Mich.	Minn.	Iowa	N. D.	S. D.	Nebr.	Wyo.
Traffic Units....	25.81%	29.03%	4.65%	3.79%	24.84%	.04%	4.28%	6.14%	1.42%
Operating Revenue.....	27.51%	28.58%	3.67%	3.51%	22.66%	.03%	4.79%	7.79%	1.46%
Use of Rolling Stock.....	24.06%	27.86%	2.98%	3.88%	27.23%	.04%	4.98%	7.43%	1.54%
Transportation Train Miles...	25.28%	25.25%	2.85%	4.72%	25.17%	.06%	6.98%	8.30%	1.39%
Miles of Road Operated.....	25.63%	9.78%	6.17%	7.69%	19.31%	.17%	14.96%	13.00%	3.29%
Miles of all Tracks	26.98%	16.84%	7.74%	6.06%	18.73%	.12%	10.76%	9.97%	2.80%

[fol. 69] Exhibit L is a statement of the ratios of performance units and units of property in each state, giving the percentage of each state to the entire line, for performance units, for traffic units, operating revenues, use of rolling stock, transportation train miles, miles of roads operated and miles of all tracks. The ratio of the traffic units in Illinois with those of the entire system is 29,03%. That is, 29.03% of all traffic carried by the North Western Railway was carried in the State of Illinois in the year 1930. 1.42% of the entire traffic units of the system was carried in Wyoming.

(The percentage of the miles of road operated in Illinois was 9.78% of the entire system. In Wyoming the percentage operated is 3.29% of the entire system. For the other states the percentages are: Wisconsin, 25.63%; Michigan, 6.17%; Minnesota, 7.69%; Iowa, 19.31%; North Dakota, .17%; South Dakota, 14.96%; Nebraska, 13%. Miles of all tracks for the different states are: Wyoming, 2.8%; Wisconsin, 26.98%; Illinois, 16.84%; Michigan, 7.74%; Minnesota, 6.06%; Iowa, 1873%; North Dakota, .12%; South Dakota, 10.76%; Nebraska, 9.97%, as shown by Exhibit L.)

(Thereupon were introduced plaintiff's Exhibits M-1, M-2, M-3, M-4 and M-6.)

Exhibits M-1 and M-2 show the tons of freight traffic originating and received from other carriers and the total carried in the State of Wyoming classified as to commodities. The total tons of all freight originating in Wyoming was 844,813 tons, and the total tons of freight received from connecting carriers was 106,840 tons from connecting lines; the total for both being 951,653 tons. This 106,840 tons includes all freight received from connecting lines as well as from other divisions of the railroad. 105,762 tons of freight terminated in Wyoming.

Exhibit M-6 shows the total freight originating on the entire line in the year 1930 was 31,286,328, which is approximately 65% of the total tonnage carried. The other 35% of the freight carried in 1930 was received from connecting carriers. (Exh. M-6 is as follows:) (See following page (18a) for Exhibit M-6.)

[fol. 70] PLAINTIFF'S EXHIBIT "M-6"

Chicago and North Western Railway Company

Freight Traffic Statistics

Year 1930

(1)	Originating on line (2)	Received from connecting carriers (3)	Total tons carried (4)
Entire line:			
Tons carried	31,286,328	17,328,070	48,614,398
Miles operated	8,458.52	8,458.52	8,458.52
Tons carried per mile of road	3,699	2,049	5,748
State of Wyoming:			
Tons carried	844,813	106,840	951,653
Miles operated	278.35	278.35	278.35
Tons carried per mile of road	3,035	384	3,419
All states except Wyoming:			
Tons carried	30,441,515	17,221,230	47,662,745
Miles operated	8,180.17	8,180.17	8,180.17
Tons carried per mile of road	3,721	2,105	5,826
Tonnage of 278.35 average miles	1,029,617	570,339	1,599,956
Amount that Wyoming falls short of above average	184,804	463,499	648,303
Per cent of shortage	17.95%	81.27%	40.52%
Tonnage of 278.35 miles in states other than Wyoming	1,035,740	585,927	1,621,667
Amount that Wyoming falls short of above average	190,927	479,087	670,014
Per cent of shortage	18.43%	81.77%	41.32%

[fol. 71] Without figuring it, I would say that the freight originating in Wyoming is approximately 88% of that carried in the state, the other 12% would be that received from connecting carriers and other divisions. The base figures are shown on Exhibit M-2 for the year 1930. Exhibits M-3 and M-4 show the same information for the year 1929. Exhibit M-6 is a comparison between Wyoming and the entire line for the year 1930. It shows the tons carried for the entire line, as originating on the entire line, and the miles of road operated, and the average tons carried per mile, which is 3,699. The State of Wyoming originated 844,813 tons which were 3,035 tons per mile of road operated, and in all of the states, excluding Wyoming, the exhibit shows that the tons per mile originated were 3,721 tons per mile. There originated in Wyoming 184,804 tons less than the average amount of freight tonnage of the entire system. As compared with Wyoming, freight originating in the other states exceeded that in Wyoming 18.43% for the entire line. Freight received from connecting carriers average per mile 2,049 tons. In Wyoming, the average so received was 384 tons per mile. In all states except Wyoming, the average was 2,105 tons per mile. The tonnage thus received in Wyoming was 81.27% below the average of the entire system and 81.77% below the average for the other eight states. The average for the system of all tons carried was 5,748 tons per mile. In Wyoming, the average was 3,419 tons per mile; excluding Wyoming, the average was 5,826 tons per mile. Wyoming fell short 40.52% of the average for the system and short 41.32% of the average for the other eight states.

All the tonnage carried falls into two classes, either originating or received from connecting carriers. Originating freight in Wyoming falls short of the average per mile originating throughout the system 17.95%.

The haul of empties enters into the value of the railway of plaintiff. The company keeps an accurate record of the amount of empties hauled in proportion to the amount of loaded cars hauled of all classes of freight.

Exhibit M-2 shows that out of 844,813 tons of freight originating in Wyoming, there were about 675,000 tons of petroleum and lubricating oils and petroleum products, which would be about 80%. Also there are 27,000 tons of live stock and products of animals. Petroleum products, as I

[fol. 72] understand here, almost invariably are carried in tank cars. Tank cars must handle similar fluid products and not miscellaneous freight. In the handling of both live stock and products moving in tank cars, there is practically a mile empty for every loaded mile that the car travels. There are no return products for which the cars can be utilized. The carriers receive no revenue from the back haul of the empties either tank cars or live stock cars.

I have figures showing the percentage of back haul of empties throughout the system to the loaded haul to be 63.38% for the year 1930, which means that for every loaded car hauled 100 miles, an empty car would be hauled 63.38 miles. Confined entirely to Wyoming, the percentage of back haul of empties is 85.74%.

(Thereupon was introduced plaintiff's Exhibit P-1.)

Exhibit P-1 indicates a tremendous decline in the net railway operating income of the Chicago and North Western Railway during the past two years throughout the system. In the year 1930 the net railway operating income was 66.49% of that of 1929 and in 1931 it was 23.92% of that received for 1929. In 1931 the total net operating income of the company throughout the system was $6,272,136. The fixed interest and funded debt charges for that year were $16,178,907.

(Thereupon was introduced plaintiff's Exhibit Q-1.)

Exhibit Q-1 shows the loss of market values in the securities of the plaintiff during the year 1931, computed from the high quotations of January to the low quotations of November. This exhibit was made up in the month of December and shows a market loss of these stocks and bonds, marketable securities, to be $197,757,159.

(Thereupon were introduced plaintiff's Exhibits R-1, R-3, R-5, R-7, R-9, R-11, R-13, R-15, R-17, and R-18.)

Exhibit R-1 is a statement of the appraisal of the railroad property of plaintiff by the Interstate Commerce Commission under the act of 1913 based on cost as of the date of June 30, 1917, plus the net additions to December 31, 1930. Net additions are the expenditures that have been made upon the property since June 30, 1917, less the retirements, that is, net additions. The appraisal of the entire system of

plaintiff on December 31, 1930, was $669,198,216. For that [fol. 73] portion of the property in Wyoming, the appraisal was $11,724,126, which included an appropriate allocation of the equipment to that date. The percentage of the property in Wyoming to that of the entire system was 1.75%, which included all kinds of railroad property, fixed and rolling stock.

This appraised value per mile of the Wyoming property was $42,120, as compared with $79,813 for the entire line or a percentage for Wyoming of 52.77%. 52.77% of 3.29%, the latter representing the percentage or distance of main line track in Wyoming to the whole system, is 1.736%. The total appraisal of the property of plaintiff as of December 31, 1930, does not take into consideration deductions for depreciation on either the value fixed as of June 30, 1917, nor on the additions thereto.

Exhibit R-3 shows the appraisal of the property by the Interstate Commerce Commission as of June 30, 1917, for the entire line of plaintiff classified as to land, engineering and grading, bridges and tunnels, track structures, fences and road crossings and signs, signals and interlockers, and other fixed property, the total amount being $416,946,828. By adding to this the equipment and amount allowed for materials and supplies, the total is $501,658,211. For Wyoming, the total of fixed property is $6,350,551, and including equipment, materials and supplies, the total for Wyoming is $7,242,363. If the percentage of miles in Wyoming to the entire line of the plaintiff, that is, 3.29%, were used it would indicate the total fixed property for Wyoming to be $13,717,551.00, and by adding equipment, material and supplies thereto, the total for Wyoming would be indicated to be $16,504,555.00, which is $9,262,192.00 more than the actual I. C. C. appraisal of the company's Wyoming property.

Exhibit R-5 shows the appraised value of the Interstate Commerce Commission as of June 30, 1917, of the average mile of the road of plaintiff in Wyoming was $26,019, which was 43.19% of that of the system.

Exhibit R-7 was made up exactly the same as Exhibit R-3, taking into consideration the net additions from June 30, 1917, to December 31, 1930, which gives the same appraised value in total as shown by Exhibit R-1 as to the system and as to Wyoming. It shows that by allocating

[fol. 74] 3.29% of the total to Wyoming, there would be an excess over the I. C. C. appraisal for Wyoming in the sum of $10,292,495.

Exhibit R-9 shows the valuation fixed by the appraisal of the I. C. C. as of December 31, 1930, for the State of Wyoming to be 52.77% per mile of that of the entire system.

Exhibit R-11 is a chart comparing the value of the railroad operating property of plaintiff based on market value of stocks and bonds and net railway operating income capitalized at 6% with the I. C. C. appraisals for the years 1926, 1927, 1928, 1929 and 1930. The percentage of the average valuation for the five-year period, as based on the market value of stocks and bonds and net railway operating income capitalized at 6% to that of the I. C. C. appraisal, is 60.3%.

Exhibit R-13 is a chart comparing for each state the value of plaintiff's operating railroad property based on market value of stocks and bonds and net operating income capitalized at 6% with that of the I. C. C. appraisal adjusted to December 31, 1930; that for the State of Wyoming being $6,574,882, or 56.08% of the I. C. C. total appraisal.

. Exhibit R-15 is something of a test, really a reflection of real values in this appraisement, and to make this test, I have taken the operating revenue per mile of road for each of the nine states. Then I have taken the amount of property on the basis of the Interstate Commerce Commission appraisal, as shown in Exhibit R-1, all for the year 1930. The amount of operating revenue in Wyoming per mile was $6,884. The average system operating revenue per mile of road was $15,373. As shown by the I. C. C. appraisal, it required $42,120 of property to earn $6,884, or $6.15 worth of property to earn $1.00 of revenue in Wyoming. On the whole system, it took $5.19 in property as appraised to earn $1.00 of revenue. It required in Wyoming 1.18 worth of property to earn as much as a dollar's worth of property earns on the average on the entire line.

Exhibit R-17 has the same information taking the entire line with the State of Wyoming only, for a five-year period. It shows a percentage relation of the amount of property required to earn a dollar in Wyoming as compared with the entire line. That is to say, it takes 125% as much property, as appraised by the Interstate Commerce Commission, to

[fol. 75] earn a dollar, as it does for the entire line of the North Western Railway.

Exhibit R-18 shows computations involving that percentage of 125. The proportion of property in Wyoming, on the basis of the I. C. C. appraisal, we found to be 1.84% over a period of five years, and in considering that percentage, it should be remembered that that assumes every dollar's worth of property to have equal value with every other dollar's worth of property of the entire system, and in order to test the value, measured by dollars, I have set up the exhibit just described, showing that it takes 125% as much property in Wyoming as on the line generally, so this should be taken into consideration, in considering the percentage of 1.84, and dividing that by 125, to find out what 100% relation is, and we find that the correct proportion of value in Wyoming, based upon its earning power only, as compared with the entire line, would be 1.84 divided by 125, which equals 1.472%. That is to say that the real value of the property in Wyoming taken on the basis of the I. C. C. appraisal and considering this question of how much it takes to earn a dollar, the real value of the entire line so determined in Wyoming would be 1.47% of the entire line.

The combination of our three factors for the five years was 1.56 and this gives us 1.472 as the practical valuation of the appraisal of the I. C. C. By using this percentage as the allocating factor, the valuation of the Wyoming property would be a less amount than that by using a combination of the three allocating factors for which the plaintiff contends.

(Thereupon was introduced plaintiff's Exhibit V being a copy of a typewritten statement of about eight pages setting forth a description of the physical characteristics of plaintiff's railroad operating properties and their values as prepared by plaintiff and submitted to the State Board of Equalization of the State of Wyoming on June 29, 1928. And thereupon was introduced plaintiff's Exhibit V-1, being a similar document, but revised as of January 1, 1929, and presented to the State Board of Equalization at the hearing on July 12, 1930.)

(The information contained in Exhibits V and V-1 being a comparison of the properties of the company in Wyoming with those in the other states throughout its system is sub-

stantially the same as given in the testimony of Mr. Lorch appearing elsewhere in this record.)

[fol. 76] Thereupon plaintiff introduced in evidence plaintiff's Exhibit Y, which is a transcript of the proceedings had before the State Board of Equalization in July, 1931, and of evidence submitted by the plaintiff at that time in objection to the valuation theretofore tentatively fixed by the Board. The substance of the pertinent points in Exhibit Y is as follows:

Plaintiff's Tax Commissioner, R. E. Miller, explained to the Board the method by which the company arrived at the value of its railroad operating system by capitalizing its income at six per cent and by use of the market value of its stocks and bonds both over a period of five years, and of allocating to the State of Wyoming the portion of its property in that state, by use of traffic units, use of rolling stock and operating revenue. Mr. Miller stated that the valuation reached by the Board exceeded the actual value of the property in Wyoming to the extent of $1,972,706, and that the gross operating revenue of the system in 1930 was 15.96% less than in 1929, and in Wyoming it was 12.01% less than in 1929; that the railway operating expenses throughout the system in 1930 were 12.31% less than in 1929, and in Wyoming they were 9.85% less, and that the net railway operating income in 1930 decreased 90.55% over 1929 throughout the system, and showed a deficit of $150,167 in Wyoming.

Mr. Balch testified before the Board, explaining the use of capitalized income and market value of stocks and bonds to arrive at the system value of the railroad operating property and the use of the allocating factors of traffic units, use of rolling stock and operating revenue, and stated the value of the company's property in Wyoming to be not more than $5,847,570. Plaintiff's Exhibit Y contains several tabulations or exhibits which were explained and called to the attention of the Board. One of these exhibits is an exact duplicate of plaintiff's Exhibit G, appearing at Pages 9-10 of the statement of evidence. Another exhibit contained the information appearing on Pages 5 and 6 of the statement of evidence, showing the market value of railroad operating property less the value of non-operating property locally assessed as therein set out. Another exhibit presented to the Board was an exact duplicate of plaintiff's Exhibit B-4, referred to on Pages 5 and 5 of the state-

ment of evidence. Another exhibit presented to the Board was an exact duplicate of plaintiff's Exhibit C, referred to on Pages 5 and 6 of the statement of evidence, showing [fol. 77] the system value of the property after deducting the value of properties locally assessed to be as therein set out. Another exhibit called to the attention of the Board at the hearing was a duplicate of plaintiff's Exhibit F referred to on Pages 6 and 7 of the statement of evidence and containing a tabulation of the traffic units in each state and the ratio thereof, the railway operating revenues in each state and the ratio thereof, and the use of rolling stock in each state and the ratio thereof, for the year 1930, the ratios in Wyoming being as follows: Traffic units, 1.42%, railway operating revenue, 1.46%, and use of rolling stock, 1.54%.

Still another exhibit presented to the Board showed the operating revenue per mile of road in each state for the year 1930, the ton one mile revenue freight, the passenger one mile, all as per miles of road, and also the ton miles revenue freight, passenger miles freight revenue, and passenger service train revenue, all on a train mile basis. The operating revenue in Wyoming per mile of road was shown to be $6,844 per mile as compared with $15,373 on the average system mile; ton mile revenue freight was shown to be $420,687 as compared with the system average of $895,012. The passengers one mile in Wyoming were shown to be $6,673 as compared with the system average mile of $98,411. The ton miles revenue freight on the train mile basis were shown to be 439.11 in Wyoming as compared with the system mile of 494.82. The revenue passenger miles in Wyoming on the same basis were shown to be 9.71 as compared with 47.34 throughout the system. The freight revenue on the same basis was shown to be $6.62 in Wyoming as compared with the average system mile of $6.27, and the passenger service train revenue on the same basis was shown in Wyoming to be $.63 compared with the average system mile of $1.61.

There was also an exhibit introduced before the Board showing a comparison of the first five months' periods in the years 1925 to 1931, both inclusive. The gross operating revenues for the five months periods decreased from $55,165,477 in 1925 to $42,982,580 in 1931. The net railway operating income for the five months period decreased

from $4,659,979 in 1925 to $2,123,088 in 1931. The net income for the five months period decreased from $690,077 in 1925 and $2,669,940 in 1926 to $399,822 in 1930, and a deficit of $2,920,700 in 1931.

In connection with plaintiff's Exhibit Y and at the time [fol. 78] same was presented to the State Board of Equalization on July 8th, 1931, with reference to the taxation of plaintiff's property in Wyoming, the State Board of Equalization, speaking through Mr. McWhinnie, a member of the Board, advised the plaintiff in substance as follows:

"I do not agree with the Balch theory at all. It is al- right as far as it goes, only it leaves out half a dozen items that ought to be considered. For instance, your operating ratio is lower in Wyoming than on the whole system. Wyoming does not get credit for that. If the operating ratio on the whole system was the same as in Wyoming, you would be saving millions. You would not be in the red here. Your excuse is, you say, that you haven't got the big terminals, and all of the rest of it; but that is the final result, an investment is dependent after all on the net result, and that is the net revenue. Wyoming ought to be given credit since it is virtually a branch line, for a certain part of that overhead that we create on traffic that originates in Wyoming. Most of plaintiff's hauls out of Wyoming are long hauls and create large mileage.

"Now, if a carload of wool, or stock, or oil, it does not matter what it is, is loaded at Casper, the State of Wyoming gets credit for the 150 miles in Wyoming, and Nebraska gets the credit of all the rest. Now, there is no counter-balance in effect for that. We do not get anything except what is coming to Wyoming. There is no other balance of traffic to offset what Wyoming gives the other states. You should give each state credit, a mileage credit, for what it originates, according to the mileage that it travels in other states; and if you did that, you would find that the ratio would be quite different. It would be quite enough to alter the ratio entirely. These two questions are enough to alter the ratio that you are contending Wyoming is entitled to.

"There are other minor things. The fact that that says there that the operating ratio is so much smaller. Now, Mr. Miller taxed Wyoming with the proportion of the bonds

and stocks, or, rather, allocated to Wyoming a charge of interest on bonds and stocks. If we capitalize that, you, yourselves, value this road in Wyoming at close to twelve million dollars. It shows that you yourselves must be valuing it at that proportion of the whole system. And if you take the ratio of that, leaving out the question of charging [fol. 79] it up to us—that much interest, but taking the ratio that that interest is to all of your indebtedness on bonds and stocks, we get another ratio again.

"I have given you three figures that would affect the ratio. Mr. Balch suggested three methods of arriving at the valuation or ratio, and I suggested three that altered those ratios; but I think I can go through it thoroughly and show you some others, too. I have tried to reconcile the figures that were arrived at by adopting your stock and bond valuation and allocating the ratio to Wyoming to see that it balanced more or less with the valuation that was put on it by Wyoming. By adopting all of these different things, I found out that they were not so very far off. Now, of course, the condition today, we are perfectly willing to make certain allowances that you are not doing as well as you were; but I do not think that, if you are going to adopt a formula to base the value of your road here on, or that portion of it, I think it ought to take in everything and not just pick out one or two things and say, 'that is the ratio that should be applied to find out what each section of it is worth.'

"I am telling you how I have arrived at the value, and I have tried to be fair too."

Cross-examination:

I have been employed by the plaintiff a little over twenty years in my present capacity, but I was employed by it from 1885 to 1903 previous to that. Not in my present position but in the same character of work, statistician. I am not an auditor of the company. My name will be found in the official guide. I am not president nor secretary nor an administrative officer of the company. I am not its principal accounting officer. I am not familiar with valuations of railroad properties generally—just of our own system. I am familiar with the printed matter in published decisions of the Commission and their methods and so on. It

is a matter of public information. I have not made a study of any other systems with relation to their tax values and actual values as I have with our own system. I am not familiar with the actual values of the operating properties of the Burlington and Union Pacific Railroads in Wyoming. I do not profess to know anything about the relation of the taxable value to the actual value of either of [fol. 80] those systems in the State of Wyoming.

In the exhibits to which I have testified and which have been offered in evidence as plaintiff's Exhibits B to R-18, inclusive, I have not used, as a factor in determining the value of plaintiff's operating property in Wyoming, the net operating revenue of the system. I have used gross operating revenues as a factor in these exhibits in each instance. No use has been made of net operating revenue in determining values of plaintiff's Wyoming property. I can not answer for the general public as to the basis of value for the purpose of investment in plaintiff's securities including its stocks and bonds— I have not purchased any myself. My opinion is that it is the earning power of the properties underlying the securities, which enables them to pay their interest or dividends or whatever it may be.

I said under direct examination that to determine the value of the operative properties of the whole system of plaintiff for the year 1930, that I capitalized the net operating income at 6%. Net operating revenue does not constitute a factor that fixes the value of the plaintiff's securities in the market instead of gross operating revenue. Net operating income is the gross operating revenue less all of the expenses of operation. Net operating income does not constitute a factor but is a fact that is considered in fixing the value in the market of plaintiff's securities. Net operating income has a relation to the value of plaintiff's securities in the market. That is the securities including the stocks and bonds of the plaintiff are bought and investments are made therein because of their value in power to produce income to the investor.

If the records of operation of a railroad system satisfy the investor that the result of operations is a net income, which would result in a profit on his investment, I would say that gross operating revenue would be a factor in inducing the purchase of the securities of the system.

I do not know offhand and have no exhibits setting up the percentage relation of the net operating revenue in Wyoming upon plaintiff's operative property to the net operating revenue of plaintiff's entire operative system. I have not given consideration to that relation in determining the value of the properties of plaintiff in Wyoming for [fol. 81] taxation and in presenting my theory to the State Board of Equalization I did not use these two amounts as a factor in determining for taxation plaintiff's operative property in Wyoming for the year 1930 nor for any other year. I used net operating income capitalized at 6% in determining the value of the whole system of plaintiff's operative properties. As the statistician for plaintiff, I determined, for the purpose of taxation of the plaintiff, the valuation of its operative properties in the nine states through which its system operates. I made figures for Wyoming and for all of the states. My figures have not been refused anywhere. Wyoming did not tax upon my set-up. I filed my figures for consideration everywhere. I do not know what basis the other states did use. They sometimes take my figures as far as they go and modify them according to their ideas, and I can not safely say. I think that they have been influenced by my figures in every state where we have filed them; they have given them serious consideration. They have been influenced toward accepting my figures. They have acted upon them as submitted in some instances, but not in every instance. The value of the operative properties of plaintiff located in the other eight states has not been determined by use of the same three factors, as submitted in Wyoming as a proper basis for valuation.

In the State of Minnesota, we are taxed on a gross earning basis, and, of course, these figures are not submitted. Nine states, of course, include Minnesota, that should always be excepted. In Nebraska the last two years they have used our gross earnings factors and the miles of all track, discarding the other two. In the State of Wisconsin, they use all of my factors and in addition, three others. In the State of Iowa, they use all of my factors and one or two others. In the State of South Dakota, we have no knowledge any more than we have in Wyoming what they use.

In the State of Illinois, we have no knowledge of their basis and we file our figures, and as I say, they have been influenced, tending from their conclusions, toward my conclusions. They have not given 100% consideration to them, but they have given them serious consideration. We do not know what Michigan does, they come very near to my figures, but we do not know how they do it.

The percentages of the value of the property of the sys- [fol. 82] tem that I assign in my set-up is a theory that is generally accepted.

My set-up will not remain constant if the exact value which I propose is not accepted in a particular state. It will have to fluctuate according to the difference in value. My percentage of set-up will vary with the use, but it will represent the use always and it varies not much from year to year among the several states.

If we assign to Nebraska forty million dollars of valuation of our property for taxation and they assess it at sixty million, we would go to court then. Such action by Nebraska would not vitiate my figures at all; it would merely indicate that they did not accept them.

If the nine states do not tax upon the percentages I furnish, some assessing at a greater value and some at a less, then my table of allocated percentages will not reflect the physical value in the different states, but we are overtaxed. I do not know of any states where they are less than ours. If there is any deviation, it is an over-assessment like it is in this state. Of course, if one state imposes undue burdens upon us and the other does and the other does, it becomes unbearable, that is all.

I have never suggested to the State Board of Equalization of Wyoming that the two factors in my Exhibit L, miles of road operated, 3.29, and miles of all tract, 2.80, should be used by it as two factors in determining valuation of plaintiff's property in Wyoming. In fact, I filed that exhibit to show my objection to the use of them, the impropriety of their use.

All freight traffic originating at one point in any state and terminating at another point within that state, is allocated to the state itself. All traffic originating in one state and terminating in another state or passing through two or more states is allocated to the several states on the basis of the mileage traveled in making the transportation serv-

ice—the mileage in each state. In the allocation of freight that goes from one state to another we do not give any consideration to the freight rate basis or differential in the basis. If the freight rate in Wyoming is higher than it is in the other states or if it is lower, it is allocated on a parallel of the mileage proportion. I can not answer offhand whether there are any states where the freight rate is lower than in Wyoming.

[fol. 83] For the year 1930, the plaintiff reported in its return to the Wyoming railroad commission that net operating revenue in Wyoming was $656,139.75, and the total net operating revenue for the system for the same year was $28,939,050.20—net revenue, not net income. This would be $2,357 per mile of road for Wyoming. For the entire system, the net revenue for the year 1930 was $3,421 per mile of road. The percentage relation of the per mile operating revenue in Wyoming to that of the system is about 69%. 69% of the average value per mile of road of the system, $44,360, is $30,608, representing the value of a mile of road in Wyoming as compared to the value of the average mile of the system determined in this manner. The State Board of Equalization determined the value of the operating properties of plaintiff in Wyoming for taxation for 1931 at $28,313. The valuation placed by the Board upon the per mile of track in Wyoming for taxation is not as high as the valuation arrived at by this method of computation.

Redirect examination:

The only means by which I am able to tell what moves the buying public to buy stocks in any corporation, or any securities at all, is to derive a profit. The market value is what the public is willing to pay and does pay. All of the factors, with reference to which I have been interrogated on cross-examination, have been taken into account in the system valuation by stocks and bonds and by the factors of traffic units, and operating income, and use of rolling stock, within the state.

Examination by the Court:

$2,357 per mile of road in Wyoming represents the difference between the gross operating revenues and the items

that are classified as operating expenses. It does not include the item of taxes. It is designated as net revenue. You will notice on Exhibit D for 1926, I have gross operating revenues of 154 million plus. Then I have operating expenses of 120 millions and after that is deducted, I have the item "Net Revenue for Railway Operations" of 33 million dollars, but there are still 11 million dollars of operating expenses that are not included in that figure and, therefore, it is not a conclusive figure. I have used the figure at the bottom, 22 million, which is the conclusive figure. The figure $2,357, is the net revenue of operation and compares with the 33 million figure on the exhibit.

[fol. 84] J. A. LORCH, a witness in behalf of plaintiff, testified:

Direct examination:

I live in Evanston, Illinois, and have been employed for fifteen years by the Chicago and North Western Railway Company as valuation engineer. Previous to that, I was employed for five years in the engineering department of the plaintiff on maintenance and construction work. Previous to that, I was for two years in the trackage department of the plaintiff. I have been employed by plaintiff for twenty-seven years. I am personally familiar with the properties of the plaintiff throughout its entire system—I believe as familiar as any one man can become with the property of a railroad of 8,000 miles. I have been over the entire system. I am familiar with the office records of the company as to its properties and the character of them throughout the system.

My duties as valuation engineer are to co-operate with the Bureau of Valuations of the I. C. C. in connection with valuation matters and to furnish the commission with such reports and returns as are called for by various valuation orders. All of this work is done under my personal supervision. I am familiar with the work done by the Valuations Bureau of the Interstate Commerce Commission under the act of 1913 and with the progress of that work from the beginning. I supervised the work of the Chicago and North Western Railway forces who were co-operating

with the bureau in making their inventory of the property of the plaintiff. After the valuation act became effective, the Bureau of Valuations of the I. C. C. put forces into the field to make an inventory of all the physical property of the railroad. These field forces, as a matter of convenience and to avoid duplications, were divided into three distinct groups or branches, roadway and track branch, to inventory the roadway and track items; the land section, to inventory and investigate the right-of-way and carrier land and non-carrier land; and the equipment forces, which were to inventory the equipment of plaintiff. The fixed physical property was inventoried by states. The land was inventoried by states. The equipment was inventoried for the system as a whole. After the inventories of the operating property of the plaintiff were all completed, they were furnished us by the I. C. C. The decision by the I. C. C. as to the valuation of the property of plaintiff was rendered by the commission in 1928. The value of the entire system was fixed at $501,658,211, which figure was ar- [fol. 85] rived at on the basis of cost of property. This value was arrived at first by state boundaries. The amount of rolling stock was arrived at for the system as a whole and no division was made of rolling stock by states. The Bureau of Valuation of the I. C. C. ascertained the cost of reproduction and cost less depreciation of the property as of June 30, 1917, with the 1910-1914 price level.

(Thereupon was introduced plaintiff's Exhibit S, a classified statement of plaintiff's operating property in Wyoming as of June 30, 1917, compiled by the Interstate Commerce Commission June 5, 1928, showing the cost of plaintiff's property in Wyoming to be $6,954,766.00 and the cost, less depreciation, to be $5,194,594.00.)

Exhibit S is a summary of the summary sheets of the properties of plaintiff in the State of Wyoming, which extends to the state line from Lander, Wyoming. This exhibit includes the fixed physical property and excludes land, equipment and rolling stock. They include road, grading, track, rail, bridges, buildings and all other property exclusive of land and equipment. Right-of-way is not included.

(Thereupon was introduced plaintiff's Exhibit T.)

Exhibit T includes all operating property of plaintiff as valued by the I. C. C., to which has been added additions of properties installed subsequent to the valuation date. That is, additions and retirements, or betterments less retirements, which shows the actual investment in the property from year to year and the amounts by years. The total net additions amount to $167,540,005, which makes a total as of December 31, 1930 on a cost basis of $669,198,216.

(Thereupon was introduced plaintiff's Exhibit T-1, being of the same general character as Exhibit T, but limited to the State of Wyoming.)

Exhibit T-1 is the amount of property shown in Exhibit T but prorated to the State of Wyoming on the basis of the reports submitted by the I. C. C. of the property of plaintiff in the State of Wyoming. It shows the value of the property of plaintiff located in the State of Wyoming and allocated to the state as of June 30, 1917 was $7,242,363. [fol. 86] It shows the actual investment in plaintiff's operating properties in the State of Wyoming since June 30, 1917 to December 31, 1930 to be $4,481,763, and a total of plaintiff's operating properties in Wyoming as of December 31, 1930, to be $11,724,126. There is depreciation in these figures as near as can be ascertained of the property both as to the system and that located in Wyoming as of the date of June 30, 1917, but no depreciation has been figured on either the additions to the system or to the portion located in the State of Wyoming.

(Thereupon were introduced plaintiff's Exhibits U and U-1, U-2, U-3 and U-4, U-5, U-6, U-7, U-8 and U-9.)

Exhibits U to U-9 were prepared by me and are intended to show the physical characteristics of the Chicago and North Western Railway in the various states of the property. They show in a general way the physical characteristics of the main items of the property throughout its entire system.

PLAINTIFF'S EXHIBITS U AND U-1

Illinois

Mileage

820 Miles of Road.
264 " " 2nd Track—Chicago to Clinton, Chicago to Harvard, Chicago North to State Line.
61 " " 3rd Track—Chicago north to State Line, and Chicago to West Chicago.
56 " " 4th Track—Chicago north to State Line.
1092 " " Yard Track and Sidings.

Weight of Rail

197 Miles 110# Rail—Chicago to Clinton and Chicago to Milwaukee.
635 " 100# "
200 " 90# "
86 " 80# "
73 " 72# "
10 " 65# " or Less.

Grading

Over 51,000 cu. yds. per Mile.

[fol. 87] Grade Separation

Chicago Shops to Evanston via Mayfair	10	miles
Chicago to Wilmette	15	miles
Chicago to Jefferson Park	10	miles
Chicago to River Forest	10	"
South Branch Chicago	5	"
Total	50	miles Track Elevation and 300 Subways.

Ballast

1,500,000 cu. yds. Crushed Stone.
12,000,000 Total cu. yds. all kinds or 10,000 cu. yds. per mile.

Bridges

3 Heavy Bascule Bridges spanning Chicago River in Chicago, costing over a quarter million dollars each.

Bridge over Mississippi River at Clinton—nearly $1,000,000.

Bridge over Illinois River, at Peoria—over $300,000.

Stations

4 Miles apart.

Principal Yard Tracks

Chicago	300 Miles	South Pekin	41 Miles
Proviso	218 "	Waukegan	15 "
West Chicago	35 "	East Clinton	29 "

Signal Protection

Automatic Train Control—Chicago to Clinton	137 Miles
Automatic Signals—Chicago to Harvard	63 "
Chicago to State Line, Milwaukee Lines	.45 Miles

General

Chicago Terminal Depot	$24,000,000
New Express Terminal	4,000,000
Proviso Freight Classification Terminal	16,000,000
Chicago Potato Yard	15,000,000
Chicago Shops, 240 Acres in City.	
New Freight Terminal—Merchandise Mart	1,500,000

Industrial Districts

Chicago, Rockford, Geneva, Elgin, DeKalb, Sterling and Dixon.

[fol. 88] (Witness testified:)

Grade separations in Chicago are generally known as track elevations separating the main line grade above the street level to permit traffic on the streets without interruption. Track elevations bring the grade of the tracks up from twelve to fifteen feet so as to afford greater room at the subways and for the traffic of the streets without interruption.

Plaintiff has about 300 subways that were built in connection with the track elevation and cost nearly $9,000,000. The balance of the track elevation cost about 11 million dollars, making a total of 20 million dollars. There are no track elevations in Wyoming. There is no crushed stone ballast in Wyoming. Most of the ballast in Wyoming was placed in recent years subsequent to the valuation date.

The bridges enumerated on the exhibit are just some of the more important structures that plaintiff has in the State of Illinois. There are no bridges in Wyoming comparable at all to the bridges described on the exhibit.

All the other bridges in Illinois are of a permanent type, concrete culverts or castiron pipe or concrete trestles—all permanent bridges, stone or concrete arches. Most of the bridges in the State of Wyoming are of a temporary nature, pile trestles. There are some permanent structures.

Stations in the Chicago territory and the suburbs of the city are generally of brick construction—brick and stucco with long brick platforms, and sometimes extending two blocks to accommodate long suburban trains. The stations in Illinois are generally of a permanent construction; very few frame structures except on the branches.

In Wyoming we have a very nice brick station at Casper. We have one or two others that are stucco and frame, but as a general rule, they are all of temporary construction. About one-fourth of the stations, outside of those mentioned, in the State of Wyoming are car bodies and platforms. They are not depot buildings at all. In Illinois, the stations are located with reference to centers of population in towns and cities and this is true throughout the state. The cities in Illinois served by the Chicago and North Western Railway range from 3½ million to 20,000 or 8 or 10 thousand.

[fol. 89] We have one station in Wyoming at Casper that compares favorably with some of the stations in Illinois. In Wyoming I would say that Casper, of course, is the principal point as far as cities are concerned. Lander, Riverton, Douglas, Hudson are others, and Lusk used to be quite an important point although it is not so important just now.

There are yard tracks at smaller stations in Illinois. Those in the exhibit are the most important ones.

Because of the use of the large size switch engines which are used in the State of Illinois, plaintiff has to use heavier rails for its yards and sidings than is ordinarily used for yard tracks and sidings. This is so, also in Wisconsin and Iowa as well. In the Proviso yard and around Chicago, plaintiff has quite a large amount of ninety pound rail in the yard tracks and sidings. That is, the same weight rail that we have in Wyoming, but we only have about eleven miles of that in Wyoming—the rest of it being 72 and 60 pounds.

There are no automatic signals in the State of Wyoming.

The Chicago Terminal Depot was completed in 1911. The Proviso freight classification terminal covers approximately 1500 acres and is located west of the Chicago limits. The Chicago potato yards were constructed two years ago. The Chicago shops are the principal repair and construction shops of the plaintiff.

The depots, shops, switch yards, etc. in the cities enumerated in the exhibit are all very high class railroad property.

Practically all of the State of Illinois, served by the plaintiff, is densely populated. There are no vacant or unoccupied lands in the section of the state traversed by the Chicago and North Western Railway. I would say that the approximate population living in the territory served and traversed by the plaintiff is about five million.

PLAINTIFF'S EXHIBIT U-2

Michigan

Mileage

526 Miles of Road.
66 " " 2nd Track.
451 " " Yard Tracks and Sidings.

[fol. 90] Weight of Rail

60 Miles 100# Rail.
195 " 90# "
146 " 72# "
191 " 65# " or Less.

Grading

21,000 cu. yds. per Mile.

Ballast

2,000,000 cu. yds. all kinds or 3367 cu. yds. per Mile.

Stations

4 Miles apart.

Principal Yards

Escanaba ..... 55 Miles
Menominee ..... 15 "

Spurs to Mines and Industrial establishments, 78 Miles.

General

Iron Ore business.
2 Ore Docks at Escanaba, $2,700,000.
Tie Treating plant Escanaba, $345,000 Excl. of land.

(Witness testified:)

The southern part of the state, just a small portion of the southern part of the state of Michigan, as traversed by the Chicago and North Western Railway, is quite fully settled. The balance of the state is not very fully settled. It is not quite as sparsely settled as it is in Wyoming. The principal business in the State of Michigan is the ore business. The logging industry also is quite extensive. I would say the population of Michigan, served by the North Western Railway, is about 750,000.

PLAINTIFF'S EXHIBITS U-3 AND U-4

Wisconsin

Mileage

2145 Miles of Road.
232 " " 2nd Track—Milwaukee to Clyman, and Line around Milwaukee, Evansville to Elroy—State Line to Milwaukee, Thru City of Janesville.
40 " " 3rd Track—State Line to Milwaukee.
35 " " 4th Track—State Line to Milwaukee.
1186 " " Yard Tracks and Sidings.

[fol. 91]

Weight of Rail

35 Miles of 110# Rail.
893 " " 100# "
703 " " 90# "
170 " " 80# "
409 " " 72# "
239 " " 65# " or Less.

Grading

27,000 cu. yds. per Mile of Road.

Grade Separation

3.6 Miles Track Elevation in Milwaukee.
5.4 " " Depression in Milwaukee.

9.0 " Grade Separation.

Ballast

450,000 cu. yds. Crushed Stone.
17,000,000 cu. yds. All kinds or about 7,000 cu. yds. per Mile Track.

Bridges

3 Draw Span Bridges over Kinnickinnic and Milwaukee Rivers at Milwaukee costing over $100,000 each.
Bridge over Wisconsin River at Merrimac costing nearly $400,000.
Fox River Bridge at Green Bay, costing over $300,000.
Mississippi River Bridge at Wiona costing nearly $300,000.

Stations

5.5 Miles apart.

Principal Yards

Between Kenosha and Milwaukee	182 Miles
Janesville	35 "
Fond du Lac	31 "
Green Bay	50 "

Madison	25	"
New Butler and Chase	34	"
Sheboygan	30	"
Manitowoc	28	"
Ashland	38	"
Spurs to Mines and Industrial Establishments	46	Miles

[fol. 92] Signal Protection

Automatic Signal	Harvard to Elroy	148	Miles
	Milwaukee to Wyeville	154	"
	Milwaukee to Manitowoc	80	"
	State Line to Milwaukee	40	"
	Milwaukee to Fond du Lac	60	"
	Fond du Lac to Green Bay	66	"

General

Lumber and Paper Mills, Wausau, Oconto, Kimberly, Green Bay.

3 Ore Docks at Ashland—$4,000,000.

(The witness testified:)

Plaintiff has very elaborate stations at some of the towns in Wisconsin. Madison is one of the newest and most elaborate, and it also has very good stations at Kenosha and Muskegon. All the stations are permanent and modern.

The mining and industrial establishments in Wisconsin are of the same character as those of Michigan. The principal industries of the state are lumber and paper. There are iron mines in the northern part of the state for which we have furnished three ore docks at Ashland.

As near as I can estimate the population served by the North Western Lines in Wisconsin, it is approximately 3,000,000. The southern and southwestern portions of the state are densely populated. The extreme north part is sparsely settled and is about the same character as that of Wyoming.

PLAINTIFF'S EXHIBIT U-5

Iowa

Mileage

1614 Miles of Road.
359 " " 2nd Track.
530 " " Sidings and Yard Tracks.

Weight of Rail

216 Miles 100# Rail.
538 Miles 100# "
400 " 90# "
166 " 80# "
414 " 72# "
229 " 65# " or Less.

[fol. 93]

Grading

28,000 cu. yds. per Mile.

Ballast

2,000,000 cu. yds. Crushed Stone.
12,600,000 cu. yds. All kinds or 7,000-cu. yds. per Mile.

Bridges

Double Track Draw Bridge over Mississippi River at Clinton costing $500,000.
Des Moines River Bridge at Boone costing over $600,000.
Missouri River Bridge at Blair costing over $500,000.

Stations

6 Miles apart.

Principal Yards

Boone ..... 36 Miles.
Council Bluffs ... 43 "
Missouri Valley.. 20 "
Clinton ..... 45 "
Belle Plaine ..... 18 "
Cedar Rapids ... 16 "
Tama ..... 17 "

Signal Protection

Automatic Train Control Clinton to Council Bluffs 346 Miles.

General

Shops and Yards at Clinton, Belle Plaine, Mason City, Council Bluffs, and Repair Shops at Missouri Valley. Grain Elevator at Council Bluffs, 2,375,000 bu. Capacity—$1,450,000.

(Witness testified:)

The stations in Iowa, as to construction along the main line, are all practically permanent—brick and stone. They are all located in important towns. The principal shops of plaintiff are located at Clinton, Belle Plaine, Mason City, Council Bluffs, and it has extensive repair shops at Missouri Valley.

That portion of Iowa traversed by the North Western is fully populated. I would estimate that about two million population is served by the lines of plaintiff in Iowa.

PLAINTIFF'S EXHIBIT U-6

[fol. 94] Minnesota

Mileage

650 Miles of Road.
175 " " Yard Tracks and Sidings.

Weight of Rail

18 Miles 100# Rail.
180 " 90# Rail
39 " 80# Rail
213 " 72# "
200 " 65# " or Less.

Grading

18,000 cu. yds. per Mile.

Ballast

30,000 cu. yds. Crushed Stone.
3,200,000 " " All kinds or 5,000 cu. yds. per Mile.

Bridges

Minnesota River Bridge west of Mankato costing $200,000.

Stations

6 Miles apart.

Principal Yards

Winona ..... 30 Miles.
Tracy ..... 15 "

(Witness testified:)

Half of the stations in Minnesota are of permanent construction and are modern and up to date.

The lines of plaintiff traverse in Minnesota the thickly settled part of the state and I would say that the population served is approximately 300,000.

PLAINTIFF'S EXHIBIT U-7

South Dakota

Mileage

1265 Miles of Road.
206 " " Yard Tracks and Sidings.

[fol. 95] Weight of Rail

24 Miles 100# Rail.
79 " 90# "
116 " 80# "
464 " 72# "
582 " 65# " or Less.

Grading

18,000 cu. yds. per Mile.

Ballast

33,000 cu. yds. Crushed Stone.
3,500,000 cu. yds. All kinds or 2,800 cu. yds. per Mile.

Bridges

Missouri River Bridge at Pierre costing nearly $1,000,000.

Stations

8 miles apart.

Principal Yards

Huron ..... 20 miles.
Pierre ..... 14 miles.

(Witness testified:)

The principal bridge of plaintiff in South Dakota is located at Pierre, and a few stations of South Dakota are permanent, modern depot buildings, but the general character of the stations is frame buildings. There are no box car stations in that state.

The eastern half of South Dakota is quite thickly populated. The balance is about semi-sparsely populated, I would call it. About 100,000 population are served in South Dakota by the lines of plaintiff.

PLAINTIFF'S EXHIBIT U-8

Nebraska

Mileage

1069 Miles of Road.
2 " " 2nd Track.
244 " " Yard Tracks and Sidings.

[fol. 96] Weight of Rail

52 Miles of 100# Rail.
172 " " 90# "
30 " " 80# "
369 " " 72# "
448 " " 60# " or Less.

Grading

23,000 cu. yds. per Mile.

Ballast

2,300,000 cu. yds. all kinds or 2,150 cu. yds. per Mile.

Bridges

Missouri River Bridge at Blair costing $160,000.
Platte River Bridge at Fremont costing nearly $500,000.

Stations

8 Miles apart.

Principal Yards

Omaha	20 Miles.
Fremont	18 "
Norfolk	17 "
Chadron	13 "
Lone Pine	12 "

Omaha Freight Terminal $545,000.

(Witness testified:)

The principal bridges of plaintiff in Nebraska are located at Blair and at Fremont. Plaintiff has a few permanent, modern stations in Nebraska. The balance are of the frame type. Plaintiff has an elaborate freight terminal at South Omaha, which is owned jointly with the Chicago, Milwaukee, St. Paul and Omaha and cost $545,000, one-half of the cost of which was borne by plaintiff.

The eastern half of the lines in the State of Nebraska and the South Platte lines pass through a densely populated territory. The western half is sparsely settled. I would say the population served by the lines of plaintiff in Nebraska would be about 600,000.

PLAINTIFF'S EXHIBIT U-9

[fol. 97] Wyoming

Mileage

278 Miles of Road.
95 " " Yard Tracks and Sidings.

Weight of Rail

11 Miles 90# Rail.
222 " 72# "
45 " 60# "

Grading

21,000 cu. yds. per Mile.

Ballast

420,000 cu. yds. of all kinds or 1,500 cu. yds. per Mile.

Stations

31—9 miles apart. ¼ Carbodies.

Principal Yards

Casper.....	22	miles	of	Trackage.
Hudson.....	9	"	"	"
Lusk.....	6	"	"	"

Oil Fields at Casper.

(Witness testified:)

Plaintiff has thirty-one stations in the State of Wyoming or station stops.

The principal industries are located at Casper where there is the oil industry, and the coal mines located at Hudson. I would say that the population served by the North Western Railway in Wyoming is approximately 25,000. It is sparsely settled. The extreme western part of Nebraska is the only territory served by the North Western as sparsely settled as the portion of Wyoming through which plaintiff's line runs. I have described in the exhibits the more important stations of plaintiff and the general characteristics of the property of plaintiff throughout the different states.

Cross-examination:

I do not know what factors the State Board of Equalization of Wyoming considered in arriving at its value of the Chicago and North Western Railway in Wyoming for the year 1930. The merchandise marked and the potato yard described in Exhibit U and U-1 are used exclusively by [fol. 98] plaintiff. I do not know whether it is cheaper to haul a mile of freight in Wyoming than it is in other states where there are elevated tracks, automatic signals, large bridges and other extensive equipment. Exhibits U to U-9, inclusive, have no relation to value whatever. They are descriptive testimony describing the characterist-s of the property in one state as compared with the property in other states. There is no question but what states that have a large amount of property, or more extensive property in them, have a greater value. Exhibits U to U-9 probably are related to value, although that was the cost figure as of June 30, 1917. The property listed in these

exhibits are the facilities in the property today. If the State Board of Equalization arrived at a certain figure representing the value of plaintiff's property of a certain date, it certainly must have included some of the facilities that I have recited in these exhibits. I do not know whether those are the factors used in arriving at that valuation. There may be bridges in Fremont County, Wyoming, to the value of $176,091. I do not know, but would think that approximately correct. It probably is correct that there are bridges of plaintiff in Natrona County, Wyoming, of the value of $195,600. It is approximately correct that there are bridges of plaintiff in Converse County, Wyoming of the value of $162,958, and in Niobrara County, Wyoming of the value of $102,901. The bridges that I have listed in my exhibits U to U-9 are merely a few of the important structures that plaintiff has in various states. All of the structures enumerated in these exhibits are constructed and maintained as a part of the system of the Chicago and North Western Railway Company to serve its operation purposes as part of its main line, including the big Mississippi River bridges and the little gully bridges in Wyoming and probably serve the same purposes, and the same thing is true with reference to the stations. Plaintiff receives freight and passengers fro mits box car stations. Plaintiff delivers passengers at its box car stations; I am not qualified to say whether it delivers freight or not. Plaintiff hauls ties from its tie treating plant at Riverton, Wyoming, but not throughout the entire system. Automatic signals are put into control and facilitate traffic. I presume that if conditions warranted it, plaintiff would install signals in Wyoming. Casper, Wyoming, is to some extent also a live stock shipping point. Also, sugar beets originate at Riverton and other points along the lines of plaintiff.

[fol. 99] Redirect examination:

I did not have anything whatever to do with arriving at the system value of plaintiff's properties based upon the market value of stocks and bonds and based upon capitalized net income. The figures fixed by me and testified to, as to the value of the physical property, had to do with the appraised costs, etc.

WILLIAM F. CARROLL, a witness on behalf of plaintiff, testified:

Direct examination:

I live in Casper, Wyoming, and am employed by the plaintiff in the capacity of Assistant Superintendent. I have been employed by plaintiff forty-four years, and in my present capacity in Casper, six years.

No revenue is derived by the plaintiff in the back haul of empty cars. That is an expense.

Plaintiff does not own the tank cars used by it in hauling petroleum and its products. They are owned by various owners. Plaintiff pays a rental on the tank cars used by it while they are being returned empty to be again loaded, of a cent and a half a car mile.

R. A. MILLER, a witness on behalf of plaintiff, testified:

Direct examination:

I live in Oak Park, Illinois. I am employed by plaintiff as Tax Commissioner and have been so employed for eight years. The property of plaintiff in Wyoming, subject to assessment by the State Board of Equalization, has been assessed during past years as follows:

In 1931—$7,881,004;	1925—$8,143,000;
1930—$7,970,916;	1924—$8,131,088;
1929—$8,000,757;	1923—$8,167,071;
1928—$8,104,178;	1922—$7,630,686;
1927—$7,955,791;	1921—$7,723,807;
1926—$7,881,663;	1920—$6,937,275;

Plaintiff claimed the assessable valuation of its property [fol. 100] in Wyoming for 1931 to be assessed by the State Board of Equalization to be $5,849,870; for the year 1930, $6,061,240; for 1929, $6,076,297; for 1928, $6,136,376; for 1927, $6,175,609.

The taxes on the operative property of the State of Wyoming, as assessed by the State Board of Equalization for the year 1931, were $182,455.80, all of which have not been paid. All prior years have been paid and were for 1930, $162,180.86; for 1929, $163,947.27; for 1928, $159,-

248.09, and for 1927, $153,068.17. These taxes included the levies made by the State Board and also the levies made for municipal purposes by the County Assessors. With reference to the figures claimed by plaintiff in its report for 1931 to be the proper amount of valuation, these do not include anything except the levy made by the State Board of Equalization.

Cross-examination:

The State Board of Equalization places a valuation on the property of plaintiff. I have quoted the assessed values. I am not the principal accounting officer of plaintiff.

Thereupon was marked for identification, Defendants' Exhibit 1. I know what defendants' exhibit 1 is. My signature appears on final seeet 13. (Final Sheet 13 of defendants' exhibit No. 1 is as follows:)

DEFENDANTS' EXHIBIT 1

SHEET 13

Railroads

Return for Tax Assessment of Chicago and North Western Railway Company for the Year 1930

Recapitulation—Property Statement

Sheet No.	Items		Valuation
6	Trackage, Right-of-Way and Road Bed:		
	(1) Trackage:		
	(a) Main Track	$2,085,551	
	(b) Second Track		
	(c) Side Tracks and Turnouts	426,300	
	(d) Spur and Warehouse Tracks		
		$2,511,851	$2,511,851
	(2) Right-of-way and Road Bed		2,406,914
[fol. 101] 8	Depots, Station Houses, and other Buildings and Structures, etc.		$554,993

Sheet No.	Items		Valuation
9	Rolling Stock:		
	Locomotives	$468,350	
	Passenger Train Cars	93,250	
	Freight " "	1,269,209	
	Work Equipment	57,517	
			1,888,326
10	Bridges, Tunnels, Snow Sheds, Snow Fences, and Right-of-Way Fences		726,727
11	Material and Supplies		179,688
12	Roadway Tools and Machines		13,451
	Grand Total Valuation		$8,281,950

STATE OF ILLINOIS,
County of Cook, ss:

I, R. A. Miller, Tax Commissioner of Chicago and North Western Railway Company, do solemnly swear that the above and foregoing Tax Return of Chicago and North Western Railway Company, to the State Board of Equalization of the State of Wyoming, for the year 1930, embracing Sheets Nos. 1 to 13 inclusive, of S. B. of E. Form 4, is true and correct to the best of my knowledge and belief, and that I have listed within said Tax Return, all of the property belonging to and used in the operation of said Company within the State of Wyoming, which is assessable for taxation by the State Board of Equalization of the State of Wyoming, as provided by law.

Chicago and North Western Railway Co., (Signed) R. A. Miller, Its Tax Commissioner.

Subscribed in my presence and sworn to before me this 6th day of May, A. D. 1931. (Signed) Leo C. White, Notary Public. (Seal) My commission expires Feb. 9th, 1935.

(Note attached near top of sheet:)

"The valuations shown in this return are based upon the estimated cost of reproduction new of the physical properties of the Company in the State of Wyoming, less depreciation, and without further reference to the market value of such properties, or the market value of the stocks and bonds of the Company or the present earnings of the [fol. 102] Company on said properties or the present or future earning capacity or possibilities of such properties.

"It is claimed that the valuations stated in this return do not represent the fair cash value of the property for purposes of taxation. The value as to the system, as a whole, and as to the part in the State of Wyoming is clearly and fairly set by the figures contained in the exhibits attached to this return and made a part thereof, and which said exhibits show that the total true value of all the property of the Chicago and North Western Railway Company, or every kind and nature whatsoever situated in the State of Wyoming, or properly allocated to the State does not exceed $5,849,570.

"The valuation above stated $5,849,570 should be further reduced for taxation purposes by applying an equalization ratio, which ratio shall not exceed the ratio of the assessed value to the true value of other taxable property in the State."

I took the oath prescribed there. The figures, $8,281,950 appear on the last sheet. I put those figures there and swore to them. The note on page 13 refers to the market value of the property. It is the value that I claim plaintiff should be taxed on. When I gave that value in response to counsel, it was what I claimed and certified to the Board. This exhibit came from my office. My department prepared it. My department is the Tax Department. There are clerks in the department and a man by the name of Pellatier, one of the clerks, undoubtedly typed it. I dictated that information to him.

In the note attached to page 13, the exhibits referred to are by Mr. Balch, statistician. Some of the figures were prepared by him. The exhibits were not requested by the board. The note on page 13 was not requested by the board. It was added for the purpose of clarifying the figures shown in the report and to call attention to the fact that they were cost figures.

Reports of plaintiff are required to be filed on forms prescribed and furnished by the State Board of Equalization. These forms call for information as to various classes of property. It is impossible to divide the market value of the property in Wyoming based upon the system figures and the allocation factors into these various parts. The [fol. 103] Board of Equalization does not state what value they require plaintiff to give when it makes its return.

The form simply says "valuation." I do not know what the laws of Wyoming require plaintiff to do. We tried to follow the instructions of the Board in their forms they provide. We tried to follow the law. I do not recall the wording of the law just at this time. I have read it a number of times. I swore to the entire report, defendant's Exhibit 1. Under item 4 are listed the various items of cost and sources of revenue, and allocation of the same with reference to Wyoming, which are taken from the operations of the system for the year 1930. The percentage of railway operating revenues assigned to Wyoming as of the whole, I think, is about 1.46%—somewhere along there. I do not have the percentage figures on each of those comparative assignments there. I have never computed them. I do not know what the relation of one to the other is. I know how the ratios are arrived at. I do not know just what ratios are referred to. This exhibit shows that the interest on the funded debt of the system for 1931 was $16,241,372.13, and there is charged to Wyoming $539,213.56 of this debt. These are accounting department figures, and I am not versed as to the allocation of many of the accounts. The statement is furnished by our Accounting Department. I do not know where they get the comparison. I do not know what that percentage is. I do not know anything about eleven of those items which have been allocated to Wyoming as of a basis of 3.22%. I would not say it was a fact unless I computed it. I haven't any computation of that kind prepared or with reference to the other items that have been testified to.

I do not know what factors were used by the State of Wyoming or by the State Board of Equalization to determine the value of the property in Wyoming for assessment purposes.

Plaintiff prepared a similar statement as Exhibit 1 for tax return for the years 1930, 1929, 1928 and 1927, and I signed and swore to the entire report for each year. Defendant's Exhibit 1 is based entirely on cost figures and also used for the purpose of taxation.

(Thereupon was marked for identification, defendant's Exhibit No. 2, being tax return filed with the State Board of Equalization of Wyoming in the year 1930, similar as to

form and information therein contained, to defendants' Exhibit 1.)

[fol. 104] I do not think defendants' Exhibit 2 is complete. I think some of the supplemental exhibits are lacking. I signed and verified the return, Exhibit No. 2. The return is not bound in the manner in which it was filed and is not a duplicate in its entirety of the copy retained when it was filed. There is missing from that return, unless it has been misplaced from one of the sheets there, the supplemental exhibits prepared by Mr. Balch showing the market value of the property. That is with reference to the exhibit I attached to each one.

(Thereupon was marked for identification defendants' Exhibit No. 3, being tax return filed with the State Board of Equalization of Wyoming in the year 1929, similar as to form and information therein contained, to defendants' Exhibit 1.)

I signed and verified that return, defendants' Exhibit No. 3.

(Thereupon was marked for identification, defendants' Exhibit No. 4, being a tax return filed with the State Board of Equalization of Wyoming in the year 1928, similar as to form and information therein contained, to defendants' Exhibit 1.)

I signed and verified that return—I mean the return that was filed with the tax board for assessment purposes.

(Thereupon was marked for identification, defendants' Exhibit No. 5, being tax return filed with the State Board of Equalization of Wyoming in the year 1927, similar as to form and information therein contained, to defendants' Exhibit 1.)

I signed and verified defendants' Exhibit No. 5, being a tax return of plaintiff.

Redirect examination:

The figures entering into the total of $8,281,950.00, appearing on page (printed number) 13 are the total figures representing or built on the cost basis. The printed sheets that appear in the exhibit were furnished to me by the State

Board of Equalization of Wyoming to be used in making the tax return, and I used the printed sheets so furnished. When I signed and swore to this return on the bottom of page 13, the typewritten sheet which appears to be attached and pasted on to it, was a part of that sheet and a part of the report. That same explanatory note was attached to these various reports from year to year.

[fol. 105] (Thereupon counsel for plaintiff read into the record the explanatory note attached to page 13 of the report, defendants' exhibit No. 1.)

(Thereupon it was admitted by counsel for defendants that the explanatory note attached to defendants' Exhibit 1, and just read into the record by counsel for plaintiff, was attached on the last page of each of the reports for taxation filed by plaintiff with the Wyoming State Board of Equalization, defendants' Exhibits numbered 2, 3, 4 and 5.)

The printed forms on which the same were made, and with the printing of which I had nothing to do, were alsfurnished me by the Wyoming State Board of Equalization and on which were made the taxation reports, defendants' Exhibits No. 2, No. 3, No. 4 and No. 5. Also, certain exhibits and letters attached to the same when filed, do not now appear to be a part thereof.

C. H. McWhinnie, a witness on behalf of defendants, testified:

I am a member of the State Board of Equalization of Wyoming. My appointment was made on April 1, 1927, but I was in the Land Office at that time and Governor Emerson asked me to stay there until the new incumbent of the Land Office came there, so it was toward the close of April that I qualified as a Member of the Board, and I have served continuously since that date. The State Board of Equalization taxes classes of properties, utilities, railroads, oil and other minerals, pipelines, and we set the value on live stock. These are the properties that the Board tax directly. We have made a habit of sending out recommendations to the various County Commissioners and County Assessors on what we thought would be an average of the various classes of lands, so that they would be equitably valued. We do

not actually direct that they should be assessed at any particular value, only as far as the relation between the counties is concerned, we direct that lands as well as all other property assessable by the County Assessors shall be assessed at its actual value.

The railroads, according to the laws, supply us with a list of their properties, and which they value. In the case of the plaintiff's property, the list of 1930 is valued by themselves at $8,281,950. There is a remark here which I be- [fol. 106] lieve has been read into the record before, but to connect it up, I will read the first paragraph.

(Witness reads first paragraph of note attached to Sheet 13 of plaintiff's tax return for 1931, which is the same note set out verbatim on Page 47 of this statement.)

The first thing that the Board undertook was to verify the figures as presented to them as being the valuations of the property reproduction cost new less depreciation, which is given here by the plaintiff as $8,281,950.00. This, we accomplished by taking the figures of the Interstate Commerce Commission values of 1917, and adding the betterments and applying depreciation of 2½%.

I may state in this particular instance that the Board directed me personally to do this, and then the Board, the entire Board, went over it. The next thing I did, since this remark on this states that this valuation has no reference to the market value of such properties or the market value of the stocks and bonds of the company, or the present earnings, I then took up the question of the earnings of the company. Taking the net railroad operating income I find that the Wyoming portion of that is 2.23 per cent of the entire net operating railroad income. This 2.23 per cent when applied to the system value gives us a value of $8,368,463 on an earning basis. I presented these figures to the Board and then we went to work and equalized the sum of these two figures divided by two with a property of like character in the State. I mean by "like character"—other railroads. And in equalizing the same, we arrived at the figure of $7,989,587.00. A notice was then sent to the plaintiff that that is what the Board had arrived at as the value of their property. The members of the plaintiff company appeared before the Board and presented a theory for the basis of valuation which was in the way of an objection as

to the value which the Board had notified them was found by it. So after it had made its objections and had brought out the point that they were not making very much money, the Board asked me to go to work again and ascertain whether we could allow them a reasonable reduction based on some figures which we could substantiate as against other property of like kind or character.

So I then went to work and figured out what I thought would be the best method of arriving at that and I took the [fol. 107] five years of the net operating revenue, added them together and divided them by 5, and I got the fraction of 2.114, and I thought that that was a ratio that would hold up anywhere. I mean that that was actually the earning capacity of the road. I arrived at the 2.114 by taking the net operating revenue for each of the years and found out what the net operating revenue in Wyoming was to the net operating revenue of the whole system for each year, and then added them up and divided them by 5. So then I went to work and I took the physical value as presented to us by the plaintiff, that is the physical value for reproduction new less depreciation, and figured out the ratio that that figure was to the entire value of the system. I mean the ratio of the verified amount of the property in Wyoming as related to the plaintiff's entire property. The presentation that the plaintiff made, although there are certain flaws in it, we accepted for this year, that is the total value of $375,285,902.00. That is the figure that was arrived at by the market value of the stocks and bonds and the capitalization of the net income at 6%, plaintiff's representation.

We accepted it for this year as the value of the whole. I took the physical value and the net operating income for 1930, and adding those together, and dividing them by two I get a ratio for Wyoming of 2.14 as the ratio to be applied to the whole for the Wyoming share of the whole property. Having arrived that far I went to work and figured out how I could reconcile those ratios to anything presented by the plaintiff. The plaintiff had presented the mean average of the three factors, traffic units, operating revenue, which applies to the gross, and use of rolling stock. The average for the five years was 1.56 per cent. I could not reconcile those figures with the figure that I thought was approximately the value that they should be assessed

at, but by taking the traffic units and the use of rolling stock, which was two of the three factors which they advocated, and taking the mean average between the gross and the net operating revenue. In connection with that there was a typographical error in the order issued to the extent that it said "net operating revenue," but it should have been the mean average between net and gross. I added the percentage of the track mileage, and taking those four factors, the mean average of which is 2.1 per cent of the value of the whole property that should be allocated to Wyoming. I presented this to the Board then and [fol. 108] the Board seemed to think that since we had taken two of the factors that the plaintiff had presented we would split another one with them—instead of taking the gross operating revenue we have taken the mean average between the gross and the net operating revenue, and we had added the mileage, the miles of main track, to arrive at this ratio. I presented it to the Board and they agreed that they thought that that was very fair and liberal with the plaintiff. It makes the amount of $7,881,004. 2.1 is the final percentage figure.

After that I went into the question a little more, and, to be certain that my ratio was right, I took the admitted figures as presented by the plaintiff, consisting of the physical value of the property as presented by the plaintiff. That works out 2.2 per cent of the system value. The net operating income works out 2.23. The gross operating revenue works out 1.46. The average of the traffic units and the use of rolling stock averaged 1.46, a ratio that is in keeping with the charges made by the plaintiff in an account submitted in their sworn statement for 1930.

I added these together and divided them—I have five factors and divided them—by five, and I get 2.14. Traffic units, and use of rolling stock, might very properly be used for the purpose of allocating the rolling stock to Wyoming, but, otherwise, in the case of the Northwestern, which is a branch line, really, enjoys no overhead traffic, under the conditions existing to use those as factors and to be fair to the State of Wyoming, there should be some rectification of those figures.

I mean by overhead traffic, bridge traffic, traffic that goes through. It comes in one end and goes out the other. So I figured out that the percentage of all traffic turned

over to the system by Wyoming, and other roads to the system, was 37.38 of the whole traffic, whereas the ratio in Wyoming as turned over was—the same figure for Wyoming was 11.33, a difference of slightly over 2 per cent. By taking the traffic units and use of rolling stock, as presented by the plaintiff, and adding 26 per cent of that I arrived at what I figured is a rectified condition of the traffic units and the use of rolling stock, as should be applied to Wyoming. To that I added the net operating revenue, in Wyoming, and divided the sum by two, and I get 2.15, and I felt convinced that the ratio that we had assessed them at was fair. I presented this to the Board and they approved it. That method determined the prop- [fol. 109] erty of the plaintiff in Wyoming to be, for taxation purposes in 1931, $7,881,004.00.

I might state, in connection with the use of the net operating revenue, in connection with the gross that I have used to get this factor, in Wyoming the percentage of the expenses, the operating expenses, to the gross operating revenue, is 65.56. On the whole system it is 77.74, a difference of 12 per cent—slightly over 12 per cent. Therefore, to take the gross revenue by itself, without recognizing the net operating revenue, was manifestly unfair to Wyoming. I mean that the cost of operation in Wyoming was approximately 12% cheaper than on the system.

I have shown how we arrived at the figure and I believe we took everything into consideration. We took into consideration two of Mr. Balch's three factors and then we took half of the other one and added the net operating revenue to it to get the total. I examined and familiarized myself with the theory that he presented. I can not see that it is a fair method. We took it all and considered it. We used the value of the miles of main line track in Wyoming of the plaintiff as compared to the value of the main track of the system as one of four factors. The value that we put on a mile of main line of plaintiff's road in Wyoming was $28,313.00 and some odd cents. The figure presented as the average mile value for the system was $44,360, I think. We used the factor, "gross operating revenue," only in combination with the net operating revenue. Our reason for not using gross operating revenue as a factor was that from our investigation, we found that operations in Wyoming were approximately 12% cheaper than

on the system. We did not use net operating revenue as a factor except as in conjunction with the gross.

We accepted the value as figured out by the plaintiff for the whole system. We accepted two of the factors that they presented and half of the other one and, as to that, we added one factor to balance the account as we thought fair for Wyoming.

24% or approximately 24% of all the freight of plaintiff in Wyoming is non-revenue freight. That is, freight transported by plaintiff, such as ties and coal for the benefit of the other states. The percentage of such freight on the system is approximately 16%, making a differential [fol. 110] of about 8%, and Wyoming operations transporting about 8% more non-revenue freight.

In determining the value of plaintiff's property in Wyoming, the Board always considers its franchise as a part of the value of the system. The fact that it is not listed separately, does not mean that we do not consider it in determining the value of its properties in Wyoming.

The first figure, $7,989,587, that the State Board arrived at, is what we considered as an equalized value with other property in the state of a like character, that is, other railroads.

(Thereupon the witness testified about the figures appearing on page 5 of defendants' Exhibit No. 1, which testimony is omitted for the reason that the same appears in defendants' Exhibit 8, hereinafter set forth in full.)

After the plaintiff, through its representatives, appeared before the State Board of Equalization on July 9, 1931, and presented objections to the value of its property, and in response thereto, the same was lowered by the Board, no further objections were made to the valuation as fixed prior to the time of the filing of this lawsuit.

Plaintiff, in other years, objected to the amounts fixed by the State Board of Equalization on its properties in Wyoming, and at the time of presenting their objections, urged their theory of how the value should be arrived at. Each time the Board rejected their theory as not fair to Wyoming. I think we have been very fair to the plaintiff. As a matter of fact, we have made concessions after concessions to the plaintiff with reference to valuations. In 1930, return of plaintiff of the physical value of its prop-

erties to the Board for taxation was $8,262,732.00, and the final assessment was $7,970,916. For the year 1929, return of plaintiff as reconstruction new cost less depreciation was $8,274,486 and the assessment was $8,000,757. For 1928 the figures submitted by plaintiff were $8,532,681, and the value for assessment determined by the Board was $8,104,178. For 1927 the amount submitted by plaintiff was $9,517,351, and final assessed value was $7,955,791. The values finally determined by the Board upon which the Board certified the allocated portions of that value to the Counties in Wyoming through which the road of the plaintiff runs, was less each year from 1927 to 1931, inclusive, than the sworn value of the physical properties returned [fol. 111] by the plaintiff to the Board for taxation. There were some remarks attached to the return for each year and the Board considered those remarks in arriving at the taxing value for each year. We examined them and informed ourselves of the nature of the claim. We did not adopt the figures presented in the claim for any of those years for the reason that we did not think it would be fair to the rest of the taxpayers of the state based upon our knowledge of the properties of the plaintiff in Wyoming.

In conformity with the request of the court last night, I have prepared a statement.

(Thereupon the statement referred to by the witness was marked for identification as defendants' Exhibit No. 7, which is in full as follows:)

"The amount submitted on the tax report for 1930 of the plaintiff was $8,281,950.00. This amount was accompanied by the following statement:

The values shown in this report are based upon the estimated cost of reproduction new of the physical properties of the Company in the State of Wyoming, less depreciation, and with the further reference to the market value of the stocks and bonds of the Company or the present earnings of the Company on said properties or the present or future earning capacity or possibilities of such properties.

This amount of $8,281,950.00 is 2.21% of the agreed total value of the Company's property of $375,285,902.00.

The first step taken by the Board of Equalization was to endeavor to reconcile that figure with some recognized authoritative valuation of those values of the physical property owned by the plaintiff. In endeavoring to do so, we took $11,724,126.00, as arrived at by the Interstate Commerce Commission in 1917, which includes the betterments made since. This amount was depreciated at 2.5% per annum for thirteen years, which gives a value of $8,436,076.00 at the present time.

As arrived at above	$8,436,076
Reproduction new less depreciation as submitted by plaintiff	8,281,950

The objection was made by the plaintiff that the $8,281,950 [fol. 112] was the value without regard to the market value of stocks and bonds of the Company or the present earning of the Company on said properties or the present or future earning capacity or possibilities of such properties.

The present earning capacity was next considered by the State Board of Equalization.

The net railroad operating income for the total system is $17,432,850.88. The net railroad operating income for that part of the system in Wyoming was $389,046.22. The latter figure is 2.23% of the former figure. We considered that that would clearly indicate the earning capacity of the property, which percentage of the total value of the system; therefore, $375,285,902.00 × 2.23% would give a value of $8,369,463.00 for that part of the system in Wyoming.

Earning capacity value as shown above	$8,367,463
Average value of the physical property of the plaintiff in Wyoming as arrived at and shown above	8,359,013
As arrived at above	8,436,076
Reproduction new less depreciation as submitted by plaintiff	8,281,950

By means of the above the Board arrived at a value of $8,281,950 as representing the valuation of the physical property depreciated and the sum of $8,369,463 as the earning capacity value.

The next step the Board took was to endeavor to equalize this amount with property of a like nature in the State

of Wyoming, and after thorough comparisons made between the property of the plaintiff and that of the other owners of like property in the State of Wyoming, the State Board of Equalization arrived at the figure of $7,989,-587.00, as being the equalized value of the plaintiff's property within the State of Wyoming.

The plaintiff was notified of this valuation placed on the property by the State Board of Equalization and made objections to the same and appeared before the Board on July 9, 1931. The State Board of Equalization taking cognizance of that objection endeavored to arrive at a figure that they could justify under the circumstances and yet which would give the plaintiff a certain amount of relief.

[fol. 113] Believing that the net operating revenue is an essential figure in determining the value of a system, we took the ratio that the net operating revenue in Wyoming has to the net operating ratio of the system for the last five years, adding the same together and dividing by 5, we arrived at an average ratio of 2.114% as being an average of the net operating revenue in Wyoming to the net operating revenue of the whole system.

	Net Operating Revenue
1926	1.46%
1927	2.41%
1928	2.45%
1929	1.98%
1930	2.27%
Total divided by	5)10.57%
Average	2.114%

We next took into consideration the proposition as put before the Board by the plaintiff in trying to arrive at a figure in somewhat the same manner that they had adopted. Since traffic units and the use of rolling stock apply only according to our contention to the rolling stock valuation and not to the balance of the property we, therefore, take these two factors as presented to the Board by the plaintiff, to-wit:

The rolling stock represents 23.6% of the total value of the property, as submitted by the plaintiff.

Therefore we have:

Traffic Units as submitted by the plaintiff	1.58%
Use of Rolling Stock as submitted by the plaintiff	1.64%
Divide by	2)3.22%
This is the ratio	1.61%

that should apply to that portion of the value represented by the rolling stock.

23.6% of whole value is represented by rolling stock
76.4% value balance of value

100.0%

2.13% is the ratio of equalized value as found by the Board to-wit, $7,989,587.00 to the value of the total system to-wit, $375,285,902.00.

[fol. 114]

Traffic units as submitted by the plaintiff	1.58
Use of Rolling Stock as submitted by the plaintiff	1.64
Divided by	2)3.22
Gives an average ratio of these two factors of	1.61
23.6%×1.61%	.37996
76.4%×2.13%	1.62732
100.0%	2.00728
Ratio of operating income	2.23
Divided by	2)4.23728
	2.11864

giving us a ratio of 2.11864% for the property of the plaintiff in Wyoming, which corresponds very closely with the ratio that we arrived at by using the net operating revenues as shown above.

This convinced us that a value based on these percentages of the whole value could be justified. The operation of the

Board was to endeavor to reconcile this percentage to the formula which the plaintiff had submitted to the Board.

This was done in the following manner:

Traffic Units	1.58%
Average between gross and net operating revenues	1.89%
Use of Rolling Stock	1.65%
Main Track mileage	3.29%
Divided by	4)8.41%
Average	2.1 %

By so doing accepting two of the factors proposed by the plaintiff, averaging the gross operating revenues as proposed by the plaintiff with the net operating revenue as factor three, and adding the factor of mileage of main track in Wyoming. The two factors as proposed by the plaintiff being traffic units, 1.58%, and use of rolling stock, [fols. 115 & 116] 1.65%. In averaging the net and the gross operating revenues we have accepted the other factor as proposed by the plaintiff as forming one-half of this combined factor."

This statement shows the method and factors used by which the Board arrived at the ratio of 2.1% to be applied to the total value of $375,285,902, being the value of the total property of the plaintiff, and is in accordance with my evidence yesterday.

(Thereupon was introduced defendants' Exhibit 8 which follows in full.

[fols. 117 & 118] DEFENDANT'S EXHIBIT 8

All percentages used, unless otherwise explained, represent the ratios of the relationship of the figures in any given account between Wyoming on the one hand and the System on the other hand for valuation taxation purposes.

Accounts	System	Wyoming	Ratio of Wyoming to system	Amount of Wyoming as per ratio
Operating Income:				
Railway operating revenues	$130,030,473.89	$1,905,059.55	1.42%	$5,329,059.80
Railway operating expenses	101,091,423.69	1,248,919.80	1.24%	
Net operating revenues	$ 28,939,050.20	$ 656,139.75	2.27%	8,518,990.00
Credit Accounts:				
Rent from locomotives	112,187.17	1,615.49	1.44%	
Rent from passenger-train cars	482,691.45	2,703.07	.56%	
Rent from work equipment	44,083.97	1,463.59	3.32%	
Joint facility rent income	190,163.07		.00%	
Sub Total	29,768,175.86	661,921.90		

Debit Accounts:				
Railway tax accruals	8,462,677.16	164,760.44	1.95%	
Uncollectible Railway revenues	21,346.03	1,544.35	7.2 %	
Hire of freight cars—debit balance	2,744,730.45	101,244.18	3.32%	
Rent for locomotives	107,463.96	1,547.48	1.44%	
Rent for passenger-train cars	537,353.51	3,009.18	.56%	
Rent for work equipment	5,122.11	170.05	3.32%	
Joint facility rents	456,631.76	600.00	.13%	
Total operating expenses, taxes and rentals.	$ 12,335,324.98	$ 272,875.68		
Net railway operating income	17,432,850.88	389,046.22	2.23%	8,368,463.00
Interest on funded debt	16,241,372.31	539,213.56	3.32%	12,459,492.00
Net railway operating income, less interest on funded debt and before deducting dividends	1,191,478.57	—150,167.34		
Credit Items of non-operating income:				
Income from lease of road	2,748.31		.00%	

Miscellaneous rent income	723,108.12	16,468.54	2.27%
Miscellaneous non-operating physical property	26,050.50		.00%
Dividend income	3,112,734.00	103,342.77	3.32%
Income from funded securities	1,821,835.74	60,484.95	3.32%
Income from unfunded securities and accounts	1,585,659.06	52,643.88	3.32%
Release of premiums on funded debt	24,044.14	798.26	3.32%
Miscellaneous income	390.25	12.96	3.32%
Total non-operating income	7,296,570.12	233,751.36	
Gross income	8,488,048.69	83,584.02	
Debit Accounts:			
Rent for leased roads	3,943.50		.00%
Miscellaneous rents	15,692.35	66.00	.42%
Miscellaneous tax accruals	28,417.57		.00%
Interest on unfunded debt	71,988.44	2,390.02	3.32%
Miscellaneous income charges	25,815.88	647.73	3.32%

Total deductions	145,857.74	3,103.75	
Net Income	8,342,190.95	80,480.27	
Dividend appropriation of income	7,905,208.00	262,452.91	3.32%
Balance income (or loss)	436,982.95	—181,972.64	
Total expenditures for additions and betterments (Capital account)	11,492,581.74		
Total expenditures for additions and betterments (Not including equipment) (Capital account)—Wyoming		Cr. 194,678.34	

If the value of the property of the plaintiff in Wyoming is to be based on a percentage of the value of the plaintiff's entire property. Then judging from the above account there can be only one answer to the question in the plaintiff's mind of the value of that part of the system in Wyoming and that is 3.32% of the entire value or

3.32% × $375,285,902. = $12,459,492. for the year 1930 and $7,881,004. is note quite 63.3% of that value.

[fol. 119] Defendants' Exhibit 8 is a duplicate of the statement made by the plaintiff in the tax report for the year 1931, contained on Sheet 5, with the ratios that the Wyoming figures bear to the figures of the system, and what those ratios, if applied to the whole value of the system, would make the property of the plaintiff worth in Wyoming. The only exception from being a straight copy of that is that I have put in the net operating revenues, which are not shown in the statement, but which are shown in the report to the Public Service Commission, at its proper place.

The percentage of 3.32, if used as the factor in allocating plaintiff's operative properties to the State of Wyoming, would make a value of $12,459,492.

If a uniform percentage of 2.1 with reference to the charges and credits to Wyoming were used in this statement instead of the 3.32, it would leave a final net credit balance of $44,560.00 instead of the $181,972.64 deficit.

By using the percentage 3.29, being the ratio of main line track miles of the plaintiff in Wyoming as compared with the system as the only factor, the value of plaintiff's operative properties in Wyoming for 1931 is shown to be $12,316,906.18.

Defendants' Exhibit No. 1 is the tax return for the year 1931 filed with the State Board of Equalization by plaintiff's officials on form sheets furnished for the purpose. Each of the returns for the years 1927, 1928, 1929 and 1930 were made by plaintiff upon the same kind of forms.

The plaintiff in using traffic units or rolling stock, does not take the question of non-revenue freight on the Wyoming line into consideration. The ratio of the non-revenue freight to the full amount of freight carried is 24.4% in Wyoming and only 16.2% on the system. There is a difference of a little over 8% of the traffic that is not accounted for by the plaintiff in its method of allocating values to Wyoming, which was one of the reasons why the board declined to determine values upon the method which the plaintiff suggested for Wyoming. In determing the value of plaintiff's properties for taxation in Wyoming, the Board used the percentage 3.29, ratio of the mileage as one of four factors as explained in defendants' Exhibit No. 7.

I have figured out the relationship between the tax ac- [fol. 120] cruals and the net operating revenue both for the

system and for Wyoming. In Wyoming it is 25%, not going into the fraction, and for the system it is 29%. According to the figures in the tax return of plaintiff, it requires of plaintiff's funds, 4% less to pay taxes in Wyoming than it does on the system as a whole, in round numbers.

Cross-examination:

The figure 2.57 appearing on defendants' Exhibit 8 in the next to the last column in the third line should be 2.27. The fact that the plaintiff's property in Wyoming, is, in effect, a branch line, and the fact that the State of Wyoming does not receive a credit as far as the North Western System is concerned for the haul across the state into the state on one side and out on the other is one of the factors that enters into the injustice of using traffic units and use of rolling stock as two out of three factors to allocate the value to Wyoming.

I do not think we have taken into consideration as a factor the fact that plaintiff's line in Wyoming is a branch line, and therefore, the state does not get the benefit of trans-state traffic. But this is one of the reasons why we object to the factors as presented by the plaintiff—both traffic units and use of rolling stock. We object to these factors for various reasons as I have explained this morning relative to non-revenue freight. There are various reasons why we object to taking those factors altogether.

We have figured out a relationship of what the traffic units and use of rolling stock, used as factors, should be, if you take into consideration the fact that plaintiff's line in Wyoming is a branch line.

I consider the franchise of plaintiff in this case is the right-of-way. The franchise is taken into consideration in the return made by the plaintiff. We naturally have to consider all of the factors as presented by the plaintiff. The system value of all of plaintiff's operating property, including all of its franchises, enters into it. The franchise was taken into consideration only in the same relationship as the plaintiff has submitted.

The first step that was taken in the process of valuing plaintiff's property in this case, was before the hearing. This was taken by me by the order of and with the consent [fol. 121] of the Board. I mean the details of working it out. I took as one factor, the percentage 2.23. This is the

relationship of the net operating income in Wyoming to the net operating income of the system and producing a value of $8,369,463.00.

I think the ratio of 2.21 was just to show the ratio of the value of plaintiff's physical properties as contained in its return for 1930 to the value of the whole system. It represents the ratio of the reproduction new cost less depreciation of the property in Wyoming to the accepted value of the whole. In our four factors, we took traffic units, 1.58, as one of our four factors. We accepted this factor under our formula, not under theirs. We also used the factor, 1.64, use of rolling stock. We also used a composite of the gross and the net revenue. The gross revenue factor, as reported by plaintiff, was 1.466. The percentage of the net operating revenue is 2.27 for the year 1930. As to whether I took as a factor a percentage on a one year basis and as the other factors, percentges on a five year basis, I would have to look that up. It may be so. If the net revenue for the five years is 2.114 instead of 2.27, I might use the factor for five years in determining this composite revenue factor. You must understand this was all done in a hurry to get out the statement to the plaintiff of what the Board had arrived at. Let us substitute the five year period to get it down to that basis, which can easily be done. By using 2.114 as the net revenue factor, adding 1.46 and dividing by 2, the composite factor would be 1.79 instead of 1.89. If that ratio which I fixed at 1.89 in defendants' Exhibit No. 7 is in fact and should be 1.79, then the final factor would be 2.08 and lower than it is in the exhibit, but the Board accepted the figures in the exhibit. I added the fourth factor of 3.29 and then got 8.30 and divided by 4 and got 2.075.

I have not figured out the increase in value by using the factor, 3.29% of miles of road. But I figured two or three other ways to show that the 2.1% is a fair figure to use, namely the earning capacity of the road. So the alteration of this particular one would make very little difference in a complete survey of the whole matter. The fact remains that on an earning basis, the valuation should be $8,300,000, and the some odd dollars.

Examination by the Court:

In arriving at the percentage factor, an average between gross and net operating revenues, I took the net operating

[fol. 122] revenue for the year 1930. It so happens that the gross operating revenue for the year 1930 is 1.463, and if I remember correctly, it is 1.46, on an average for the five years. They were the same for both the one year and the five year average. I could take either. I took the net operating revenue for the year 1930 in arriving at the factor, 1.89, and this is based exclusively upon returns of the plaintiff for the year 1930 and not upon the five year average. I used the five year average of net operating revenue as shown on the second page of defendant's exhibit No. 7, as proof to verify my figure. But in that operation where I used the four factors, I used the company's factors for a five year period, and I used my composite of net and gross revenue for a year period only.

The only three factors presented by the plaintiff for taxation were tra-fic units, rolling stock and gross operating revenue.

F. CHATTERTON, a witness produced on behalf of defendants, testified:

I am a member of the Wyoming State Board of Equalization and Public Service Commission. I have been such member since March 1, 1927. The general duties of the Board of Equalization are to value certain property for taxation, advise the county officials connected with taxation as to matters relative to their duties and attemping to equalize the values of the property as between counties. The Public Service Commission has charge of all of the utilities in the state relative to making rates and also has charge of fixing intrastate railroad freight rates, and it appears before the Interstate Commerce Commission in connection with interstate rates.

The return of empty cars engaged in the transportation of petroleum and its products is one of the elements that enters into the fixing of the freight rate for its transportation. It is part of the cost of operation, and that is one of the factors that enters into the base of fixing the rates.

With reference to intrastate rates, the evidence is always introduced before us as to all of the operating costs, and all of the factors that enter into the base for making a rate and the cost of the operation and return of the empties is

[fol. 123] one of the factors and is always considered and increases the rate that is allowed for the transportation of the commodity itself.

I have been admitted to practice as an attorney before the Interstate Commerce Commission and am also a member of the association of practitioners before the Interstate Commerce Commission and have appeared before them in the presentation of evidence and in arguments on interstate freight rate matters. The cost of the operation and return of the empties is one of the factors in fixing the rate on interstate traffic, and I know that because we have had several interstate freight rate cases before the Interstate Commerce Commission regarding the rates to be charged for the shipment of petroleum and it products from Wyoming into other states.

C. F. Balch, recalled in rebuttal in behalf of plaintiff, testified:

I heard the testimony of Mr. McWhinnie and have had access to a typewritten transcript of his testimony. I have attempted to work out the ratios used by Mr. McWhinnie and have a partly typewritten and partly pencil exhibit showing those matters.

(Thereupon plaintiff's Exhibit W was marked for identification, which is as follows:)

Plaintiff's Exhibit "W"

1. Net railway operating income in Wyoming 2.23% of	$375,285,902.00
McWhinnie	$ 8,368,463.00
Should be	8,368,876.00
2. Equalized (95.46%)—	7,989,587.00
5 year average of net railway operating income is 1.98% (Totals)	7,430,660.86
1.96% (5 Items)	7,355,603.67
3. 5 year average of net revenue (McWhinnie—O. K.)	2.114%
4. (a) Reported value	8,281,950.00
(b) Value of entire line	375,285,902.00

(a) divided by (b)—2.206% (not 2.1%)

Show that ratio of $8,281,950 & $669,198,216 is 1.24% (not 2.1%).

[fol. 124]

	McWhinnie	Revised	
Ratio (See 4) physical value	2.20 %	1.33	
Five year average net revenue	2.114	2.114	
Total of 2	4.314	3.444%	
Average of 2	2.16	1.722	
Ratio of physical property	1 year only	2.20	1.33
Ratio of Net Ry. operating income	1 year only	2.23	2.23
		4.43	3.56%
Average		2.215	1.78%
5% Average gross revenue (5 yrs.)	1.446%		
% Net revenue (5 yrs.)	2.114		
Total of 2	3.580		
(a) Average of 2	1.89(Order)	1.79%	
(b) % Traffic units (5 yrs.)	1.58	1.58	
(c) % Rolling stock (5 yrs.)	1.64	1.64	
(d) % Miles of road (5 yrs.)	3.29	3.29	
	8.40	8.30	
Average of 4	2.10	2.075	
Sum of (a) plus (b) plus (c)		5.01	
Average (omitting miles of road)		1.67 %	
Difference caused by including miles of road %		.43	
Effect of including miles of road .43% of $375,285,902		$1,613,729.38	
Increase in tax		34,533.81	

	McWhinnie	Revised	
6th % Physical property (1 yr.)	2.20%	2.20%	1.33
% Net operating income (1 yr.)	2.23	2.23	2.23
% Rolling Stock (1 yr.) 1.42			
% Traffic Units (1 yr.) 1.54			
2.96 Divided by 2	1.46	1.46(1.48)	1.48

[fol. 125]

% Gross Revenues	1.46	1.46	1.46
	7.35	7.35	6.50
Divided by 4	2.14	1.8375	1.625
% Physical property (1 yr.)	2.20%		
% Net Ry. operating income (1 yr.)	2.23		
% Gross operating revenue (1 yr.)	1.46		
% Traffic units (1 yr.)	1.42		
% Rolling stock (1 yr.)	1.54		
Footing	8.85		
	1.85		
Divided by 4—	2.14	2.21%	
Divided by 5—		1.77	
2.14% minus 1.77%—		.37	
37% of $375,285,002—		$1,388,557.84	
Tax on 1,388,557.84		29,715.14	
1.77% of $375,285.002.—		$6,642,560.47	
7th % Traffic units	1.42		
% Rolling stock	1.54		
	2.96		1.48 %
Increased by 26%	(?) 1.865 %		1.865%
142%×1.26—	(?) 1.7892		
% Rolling stock	(?) 1.54		
% Net Ry. operating income	(?) 2.23		
Footing	(?) 5.5592		
Average (5.5592 divided by 3)	1.8531		1.8531%
Assessed value	(Item 7)	$7,881,003.94	
1.865% of $375,285,902—		6,998,882.07	
Difference		$ 882,121.87	
Assessed value	(Item 7)	$7,881,003.94	
1.7892% of $375,285,902—		6,714,615.36	
Difference		$1,166,388.58	
Assessed value	(Item 7)	$7,881,003.94	
1.85% of $375,285.902—		6,942,789.19	
Difference		$ 938,214.75	

[fol. 126] Plaintiff's Exhibit W is a memorandum endeavoring to set up in short of a chart an analysis of that testimony that I have made.

I make the amount $400,000 less than Mr. McWhinnie made it by taking the valuation of the Interstate Commerce Commission of 1917 and depreciating betterments thereto at the rate of 2½% per annum.

I find the amount arrived at by using the ratio 2.23% of the physical value of plaintiff's property as reported in its tax return in 1931 about $400 more than the amount arrived at by Mr. McWhinnie.

If we take the five-year period instead of the one-year period and adding the percentages for each year and dividing by 5, we get 1.96% and then if I add the five-year base figures together for Wyoming and the entire line and divide the total into the total of the five years, I get 1.98%. In arriving at the 1.96, follows the method that Mr. McWhinnie used generally in arriving at these averages. Whichever one is used takes the place of the percentage, 2.23, he arrived at.

I checked the item of the five-year average, 2.114 and agree with Mr. McWhinnie. That percentage is correct taking into account the figures that he used.

He used $8,281,950 in connection with the $375,000,000 to derive the percentage ratio of 2.206. The first figure is cost less depreciation as he testified and the second one is value based upon the market value and capitalized income. No possible ratio that would have an intelligent meaning could be obtained by combining those two figures.

I have shown in this exhbit the factors which were used by Mr. McWhinnie as he testified to yesterday in making up the average of 2.1. Taking the first item of gross revenue, which is a five-year average, which I make 1.466, but Mr. McWhinnie used 1.46, and the net revenue for a five-year period, 2.114, and adding the two together, we get 3.58 and an average of the two, he gets 1.89, whereas, the correct division is 1.79.

1.89 is one of the factors that was used in fixing the value by the State Board of Equalization in its order, plaintiff's Exhibit A.

[fol. 127] Mr. McWhinnie got the 3.58 by the combination of the gross revenue percentages for five years with the

net revenue percentages for five years, and those figures are 1.466 plus 2.114% making an average of 1.79 instead of 1.89.

Mr. McWhinnie combined with the 1.89, as obtained by him, with the average for five years of traffic units, 1.58, with the rolling stock average for five years, 1.64, and percentage of miles of road, 3.29, making a total of 8.50, which he divides by 4 and gets 2.1, whereas, it should be 2.125.

This should be 8.40. Dividing by 4 gives 2.1. His division is correct.

By taking the correct figures, 1.79, 1.58, 1.64, 3.29—the sum of these is 8.30, and dividing by 4, it is 2.075.

In order to determine the effect of including the factor, 3.29, I have computed the sum of the other three factors, the total of which is 5.01, and an average of 1.67. So that by including 3.29 in the compilation, the percentage increases from 1.67 to 2.1, which is a difference of .43 of 1%. This .43 of 1% applied to the total value of the system increased the assessment to Wyoming by $1,613,729.38, and at the rate of tax paid last year, $34,533.81 in taxes.

I have taken the ratio that he used of physical property which he states at 2.2, but in order to use a ratio to find the true and intelligent ratio between that 8 million dollars of physical value and the 375 million, I have computed the market value heretofore shown on plaintiff's Exhibit R-11, showing the value as appraised by the commission to the market value of stocks and bonds over a period of five years, was 60.3. That is to say that the property as appraised physically on a cost basis was selling on the market at 60.3c on the dollar. Computing the value of the 8 million so as to get a figure to compare intelligently with the 375 million, I arrived at the value, $4,994,015.85. The ratio of this to the value of the entire line I make 1.33 instead of 2.2. The net operating revenue factor for one year, as used by Mr. McWhinnie, is 2.23. The rolling stock for one year is 1.42, traffic units for one year, 1.54, added together and divided by 2, Mr. McWhinnie states to be 1.46, but correctly divided, is 1.48. The other item, gross revenue, 1.46, is correct.

His footing that I make from his figures is 7.35, which, [fol. 128] divided by 4, as he did, would give 2.14, but correctly divided by 4 gives 1.8375.

Taking the physical property ratio on a correct basis 1.33 plus the 2.23, the 1.48 and 1.46, and adding them together, the total is 6.50, and dividing by 4, the correct ratio is 1.625, instead of the factor 2.14 obtained by Mr. McWhinnie.

Mr. McWhinnie recited another test by taking each of the five items as enumerated above and instead of combining the rolling stock and traffic units, he used them independently. The total of the five is 8.85, which, divided by 4, gives 2.21, which is used quite frequently and freely through his computations, but the correct division would be to divide the four items by 5, which would give an average of 1.77%.

Taking the 2.14 and comparing it with 1.77 to see what the effect of his computation was, we find that the use of the 2.14, as compared with the 1.77, increases the percentage .37%, and that applied to the 375 million plus would increase the assessed value by $1,388,557.84, and the tax, $29,715.14.

The 1.77 in itself applied to the 375 million would be $6,642,560.47 as the value of the lines in Wyoming computed according to this formula.

By taking the traffic units and rolling stock combined as Mr. McWhinnie said he used them, the average of the 2 is 1.48 and increasing this by 26% to make up for the difference between the traffic received from connecting lines in Wyoming and that of the entire line, would give us a factor, 1.865.

By taking 1.42 traffic units increased by 26%, a factor is obtained of 1.7892. By combining this with the factor 1.54 and the net railway operating income of 2.23 and divided by 3, a factor is obtained of 1.8531.

By the use of the factor, 1.865, to the 375 million, a value of $6,998,882.07 is obtained. By the use of the factor, 1.7892 a value of $6,714,615.36 is obtained, and by the use of the factor 1.85 as a percentage, a value, $6,942,789.19, is obtained.

With reference to the ratios of percentages to which Mr. McWhinnie testified, as derived from the financial statement on page 5 of the tax return, defendants' Exhibit No. 1. The items on lines 1 to 15 are all statements first of the operating revenues, and then the items of expense which [fol. 29] must be paid out of those revenues, and which are

connected with the railway operations. There are some figures, which Mr. McWhinnie shows on this Exhibit 8 for his first twenty lines, until he arrives at the figure for Wyoming of $389,046.22, which he shows up opposite here as a percentage of 2.23. All of the percentages above there merely represent the relation between the figures for Wyoming the figures for the entire line—none of these were derived by the use of a percentage, they are all statements of charges. I should not quite say that, because, taking the first item of operating revenues, that is an assignment on a mileage basis to all the States, not on a percentage basis, except the mileage traveled by each shipment makes a percentage, of course. Then, the operating expenses are assigned as nearly actually as our formulas permit. Then the rent for locomotives is assigned to States on the basis of the locomotive miles in each State—that is to say, we rent some locomotives down in Illinois or Iowa, and the income from that is distributed to all the States, because we have distributed all of the expense of those locomotives, repairs, and so forth, to the several States, and any credit which comes from their use in this way is distributed to the States correspondingly to the method of distributing the charges. The same applies to the passenger train cars, work equipment, joint facility rent. Then the tax accruals are actually and not on a percentage basis. The uncollectible railway revenues are actual; that is to say, they are assigned just the same as the freight revenues are. Then the rent paid for locomotives for passengers or freight train cars is assigned in the same manner as the rent collected for locomotives and cars. I mean distributed to states in accordance with the use of the states of that equipment. Then we come to the item of $389,046.22. All of the items below that are merely corporate transactions which have nothing to do whatever with the operation of the railroad. They do not enter into any of my computations anywhere nor any of Mr. McWhinnie's computations up to the point where he adopts 3.32% and applies it to the value of the entire line.

Company freight is hauled generally along with all other freight and some of the states handle considerable of the company material which is used in other states, and we have endeavored to make a correction at least in part in the operating expenses of the different states by crediting

[fol. 130] to the state which performs the service of hauling company material, that was used in other states, a credit on a ton mile basis to the state performing the service, and a similar charge to the states receiving the service, making quite a considerable adjustment all told in the operating expenses.

(Thereupon were marked for identification, plaintiff's Exhibits X and X-1.)

On Exhibit X-1, I have shown the ton miles debited to Wyoming for fuel. That is, for fuel handled by the other States destined to Wyoming—a very small item of 3,073 ton miles which was hauled through Nebraska. Then, there was other material, such as lumber and all sorts of material, for use on the railroad, on which there was 4,614,056 ton miles performed in the States of Nebraska, in South Dakota, in Iowa, and the other States, the other States being so small that I combined several of them. Now, we have computed the expense of hauling this, using six mills per ton mile for the hauling of fuel, and seven mills per ton per mile for the other freight, making a total of $32,317 as a charge against Wyoming for the service performed by the other States for it.

Now, in the next field below this, I have shown a credit to Wyoming: that is, Wyoming performed in the hauling of fuel, principally oil, 26,278,775 ton miles, which was destined to points in Nebraska, of fuel, principally oil, of which 19,738,763 ton miles was performed for material going to points in Nebraska, and so on, and the other States. The ton miles of other material was 6,722,736 ton miles, which includes ties and lumber and other material destined to points in Nebraska, South Dakota, and other States. The cost of hauling this was computed thus—fuel at six mills per mile, and other material at seven mills, making a total credit to Wyoming of $204,732, and deducting then the debits to Wyoming we have a net credit to Wyoming for handling this company material of $172,415.

This is not included in our revenue accounts, because there was no revenue in connection with it and the adjustment was made through the operating expenses, crediting and charging the several States.

I have shown on Exh. X, now, the amount charged in a similar manner for the years 1927, 1928, 1929 and 1930.

We have done this in an effort to try to correct some of [fol. 131] the increases in the figure of the net revenue among the several states, which is a very unreliable figure as stating the actual truth of operations, and you will notice here that this total credit to Wyoming is practically thirty-three million tons out of the thirty-seven million tons, which Mr. McWhinnie cites as 24 per cent of the total tonnage, and still only 8 per cent more than for the service which is performed by all the states in the entire line. This credit may not be perfect, because we have credited to Wyoming, and charged to Nebraska, company oil destined to points in Nebraska. That same oil may be taken by engines running from Chadron to Casper, and still be returned to point- in Wyoming, but this credit had a decided effect upon the net revenue reported in Wyoming, as well as upon the net operating income, for the year 1930, and that is what I want to get to you.

The percentage used by Mr. McWhinnie in his testimony as to company freight, I think was fair. His difference was only 8% lower than the entire line and credit is considerably more than the difference which he cited. It would more than make that up because Wyoming did not consume its proportionate share of company material because we have no great shops and freight yards in Wyoming. In fact, practically the largest part of the repair work for all the Wyoming line is done in other states, either in Nebraska or Illinois.

In using the factor, "use of *of* rolling stock", as indicated in Plaintiff's Exhibit A, rolling stock used in transporting company freight and non-revenue freight in Wyoming was included in all my computations.

Examination by the Court:

Q. I do not find that?

A. Pardon me, Judge, he does not show that, he shows 1.89, but does not say how he arrived at it.

Q. That is what I was interested in?

A. But in his oral testimony he refers to the combination of the gross and the net, so I have combined the gross and the net, carrying it to the third decimal so as to get it right.

Q. Did you get the figure 1.46 out of his testimony?

A. Not just at that point, but at other places in his testimony, yes.

[fol. 132] Q. As I understood him this morning, and what confused me all yesterday evening, is that he never did use a figure of five years either in regard to the average gross revenue or in regard to the average net revenue, but used the year 1930?

A. If you take the exhibit he filed this morning, the first item is 1.46, on the second page—no, pardon me—on the third page, that is right—he does not show it here, either, he shows 1.89, which I have corrected to 1.79.

Q. How do you arrive at the figure of 3.580 in your computations?

A. Why, by combining—now, take his third page of the exhibit filed this morning, and he shows there 2.11864, which he read in his testimony yesterday as 2.114. That is, I presume, the same figure; I cannot say.

Q. There, I think, is where I was confused. On the second page of the Exhibit 7 appears the average of net operating income for a period of five years, 1926 to 1930, inclusive, and it shows that average to be 2.114?

A. Yes, sir.

Q. That is where he got that figure?

A. What is where I got it, yes, sir.

Q. Where did you get the figure of 1.466?

A. That is the five year average. Just a minute—my Exh. G, down at the lower part of the exhibit, I have shown the percentages for each year of the operating revenues, adding the five years together, and I get 7.33, and dividing that by five I get 1.466, and I think that Mr. McWhinnie agreed with me exactly, because those figures were not challenged at all.

Q. On Your Exh. G?

Mr. Rose: What line, Mr. Balch?

A. It is on lines 15 to 19, down in the column marked (3) in the lower field.

Q. Yes, but what shows on my copy of Exh. G, in that third column representing operative revenue for 1930, represents 1.46?

A. Yes, sir.

Q. I do not see anywhere where the general average is used?

A. Well, I computed the general average from——

[fol. 133] The Court: Then, it is not there?

A. Not the figure 1.46, but I computed it from those figures.

Q. That is what I was asking you.

A. Pardon me, I did not understand.

My first suggestion is that there has been an error in mathematics by which a decimal figure of 1.89 has been arrived at as having been used by Mr. McWhinnie where it should have been 1.79. An additional complaint in regard to the use of that figure is that the net operating revenues should never be used as a figure in making valuations. I make no complaint that a five year average on the matter of gross revenues and net revenues was not used. A five year average on both of these was used.

The second complaint is because of the use in any form of the net revenue as a computing basis.

The other element if which I complain is the inclusion of mileage as a basis. My theory is that three elements or factors, traffic units, rolling stock and gross revenue should be used in allocating the valuation to Wyoming.

Direct examination continued:

The net railway operating income for Wyoming in the year 1930 was $389,046.22. However, that does not represent the cash transactions of the company in the State of Wyoming, or the commercial business of the railroad, and in order to get a figure that will reflect the cash situation and the results of the commercial activities by deducting a credit for hauling company material in the sum of $172,-415, leaves as the cash growing out of these activities in Wyoming $216,631.22. That represents 1.24% of the net railway operating income of the entire line. Whereas, Mr. McWhinnie has used 2.23% all through his computations and has insisted that that represented the earning power of the railroad although it contained this $172,000 of credit which was not cash at all. It was a credit for the hauling of company material.

By taking the net operating income for the entire line for 1930, 17 million plus, we find that for each dollar of operating revenue, there was left, after paying all of the expenses of operation, 13.4c, and in the State of Wyoming out of all of the revenues there was remaining for each [fol. 134] dollar of its revenues, 11.3c. The operating

ratio, as Mr. McWhinnie cited, was taken from the relation of the figures including the credit of $172,415, which would change the percentage relative to the net railway revenue which he took as 2.27 and would bring it to about 1.71. His percentage of 2.23, by the change, is brought to 1.24. My position is that in the manner in which I have assigned all of the net operating income to the several states, I have made a more just and equitable distribution of the final income for the purpose of taxation and for the study of a board of this character than these figures themselves, as reported in the annual reports to the several states referred to.

Cross-examination:

I do not mean that I have some other method of assigning revenue than that reported to the State Board of the annual return. I furnished the Board a just method in my exhibits. I used a different report and a more just method in distributing the income than that reported in the report to the railway commission.

I object to the use by the Wyoming Board of Equalization of the factor of miles of line operated in determining the value of plaintiff's property in Wyoming for taxation in the manner in which they used it. I have shown the use of the miles of road in my exhibits, J-1 and J-3, to compute the value in Wyoming, and I think, intelligently.

I take the miles of line of the entire line and then I find the value of a mile of line in Wyoming by using the relation that its characteristics are of an average mile of the line. I did not use 3.29 as a percentage. I never used this as one of the factors on a percentage basis in determining the value of plaintiff's property in a state for taxation. We have not for several years used other than the three factors presented here. Those three factors are the ones which we have been standing on for about seven years, and we have stood on them in the courts and other places where they can be used. We used transportation train miles in Dakota earlier than 1926, but I can not tell when. We used transportation train miles as a factor in Nebraska in 1921. I can not tell the other factors used without looking it up. We use as many as six factors in determining values. I presented in Nebraska all of the factors that we knew and in the use of those factors and in combating

criticism against those factors, we have learned which are [fol. 135] good and which are not good, and we have discarded those which are not dependable for our purpose and are not dependable by anybody.

I am using factors that I know I can depend on. I presume I made an affidavit in the case of the plaintiff against W. L. Osborne, Jr., Tax Commissioner of Nebraska, Docket 863, No. 29,413 in the Supreme Court of the United States. In that affidavit I stated that the plaintiff was using six factors to determine value. I have not always adhered to this three-factor proposition. Our experience in Nebraska is what led us to the adoption of the three. The question of determining values of railroad property is not *u*nsurmountable. It requires some thought, some intelligence, some comprehension of data that is before people and available, and is not to be done real easily. It is recognized by the United States Supreme Court as a difficult matter. I am not continually experimenting in that process. My process has stood the tests of the courts in Nebraska and South Dakota. It stood the test in South Dakota in the Evon case. My recollection is that they adopted my traffic units generally. I haven't the case before me.

In determining the percentage of values of plaintiff's property in Wyoming, the factor of non-revenue freight is not included in the traffic units, but the cars used in the hauling of company freight are considered in the rolling stock account.

Mr. McWhinnie is mistaken in his statement that he did not accept my factors because I did not include those elements.

The testimony I have given in connection with the testimony of Mr. McWhinnie relating to his operations, as shown by defendant's Exhibit No. 7 is my analysis of his method and conclusions as to what he did. When I used the term "intelligent ratio," I referred to what would be intelligent in my judgment.

Examination by the Court:

The figure, as used in connection with traffic units, to-wit, 1.58, is my figure as well as that of Mr. McWhinnie. The figure in connection with the use of rolling stock of 1.65 is my figure as well as that of Mr. McWhinnie. While I make it 1.64, I did not challenge it because it was so close.

[fol. 136] The figure that I used for gross operating revenue revenue in relation to business done in Wyoming, is 1.466, as indicated on Exhibit G. The figures total 7.32, divided by 5, give a result of 1.464 so that my theory as to the proper method of valuation of that property would be the sum total of 1.58, 1.65, 1.464. The total of these figures divided by 3 gives an average of 1.56, as quoted throughout my testimony. It is my contention, as a statistician for the plaintiff, that the factor, 1.56, is the figure that should be used in allocating the proper valuation of plaintiff's property in the State of Wyoming for taxation.

Recross-examination:

I have never been in Riverton, Wyoming. I am the statistician of plaintiff. I do not figure taxes. I know something about taxes, but I do not have to figure them. I could not designate individual properties on which taxes are paid.

Be It Remembered that the foregoing cause was instituted in this court by a Bill in Equity filed by the plaintiff, Chicago and North Western Railway Company; that the defendants filed answer to said Bill in Equity; that the cause has been heard upon the issues arising on said Bill in Equity and said answer, and the evidence in support thereof.

ORDER APPROVING STATEMENT OF EVIDENCE

The foregoing statement of evidence was duly lodged in the office of the clerk of this court by counsel for the defendants, and notice of such lodgment duly given counsel for the plaintiff, as provided by Federal Equity Rule No. 75 (b), and the court having considered the same, now finds the statement of the evidence, as above set forth, to be true, correct, complete and properly prepared.

Wherefore, the same is hereby approved this 24 day of April, A. D. 1933.

By the Court.

T. Blake Kennedy, United States District Court Judge, District of Wyoming.

[fol. 137] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL.—Filed Mar. 13, 1933

To the Honorable T. Blake Kennedy, United States District Judge in and for Said District:

The above named defendants, Thomas C. Rowley, as treasurer of Converse County, Charles M. Hall, as treasurer of Fremont County, Alta Pearl Massee, as treasurer of Natrona County, D. A. Shoopman, as treasurer of Niobrara County, in the State of Wyoming, being aggrieved by the decree made and entered in this cause heretofore, to-wit, on the sixteenth day of December, 1932, do hereby appeal from said decree to the Circuit Court of Appeals of the United States for the Tenth Circuit for the reasons specified in the Assignments of Error filed herewith, and the said defendants pray that their appeal be allowed, and that citation issue, as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based duly authenticated, be sent to the United States Circuit Court of Appeals for the Tenth Circuit.

These petitioners further pray that an order be entered fixing the amount of the bond and costs to be given by these defendants upon said appeal.

J. A. Greenwood, Attorney General; Richard J. Jackson, Deputy Attorney General; George W. Ferguson, Assistant Attorney General, Solicitors and of Counsel for Defendants.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Mar. 13, 1933

Come now the defendants, Thomas C. Rowley, Charles M. Hall, Alta Pearl Massee and D. A. Shoopman, the appellants herein, and say that the decree entered in this cause heretofore, to-wit, on the 16th day of December, A. D. 1932, is erroneous and against the just rights of said defendants for the following reasons:

1. The court erred in its finding of fact, "that the quan-
[fol. 138] tity, quality, cost and value of plaintiff's property

located within the State of Wyoming, measured upon the basis of miles of main line tracks, is greatly less than throughout its system, which fact was well known to the State Board of Equalization when it placed the aforesaid valuation on plaintiff's property," for that said finding of fact is not sustained by sufficient evidence.

2. The court erred in its finding of fact that the State Board of Equalization of the State of Wyoming, in arriving at the valuation of plaintiff's operative property in said state for taxation for the year 1931, "adopted and used as a factor the percentage of plaintiff's main line track located in the State of Wyoming, to-wit, 3.29%, without taking into account the fact that plaintiff's property in the State of Wyoming measured on a mileage basis, is and was greatly less in quantity, quality, cost and value than the portion of its operating system located outside the State of Wyoming," for that said finding of fact is not sustained by sufficient evidence.

3. The court erred in its finding of fact that the use of the percentage of plaintiff's main line track located in the State of Wyoming of its whole main line track as a factor in determining the value of plaintiff's property located in the State of Wyoming and subject to valuation by the Wyoming State Board of Equalization was without taking into account the difference in the character, quantity, quality, cost and value of plaintiff's Wyoming property, as compared with its property throughout its system for that according to the evidence introduced and heard at the trial of said action, the said State Board of Equalization of the State of Wyoming took into proper account the difference in the character, quantity, quality, cost and value of plaintiff's Wyoming property, as compared with its property throughout its system, and said finding of fact is not sustained by sufficient evidence.

4. The court erred in its finding of fact that plaintiff's operative property in the State of Wyoming was substantially and arbitrarily overvalued by the Wyoming State Board of Equalization, for that according to the evidence introduced and heard at the trial of said action, the said Board of Equalization of the State of Wyoming for the year 1931 valued plaintiff's operative property therein for

[fol. 139] taxation not in excess of its actual value, and said finding of fact is not sustained by sufficient evidence.

5. The court erred in its conclusion of law that "plaintiff has no adequate remedy at law," for that plaintiff, under the Statutes of the State of Wyoming, had an adequate remedy at law.

6. The court erred in its conclusion of law that "this court has jurisdiction of this cause on the equity side, and has jurisdiction to grant the equity relief prayed for in plaintiff's bill of complaint," for that the court had no jurisdiction under the pleadings and evidence to grant plaintiff the relief prayed for in its bill.

7. The court erred in its conclusion of law wherein it fixed a different value for taxation on plaintiff's operative property in the State of Wyoming for the year 1931 than that fixed by the Wyoming State Board of Equalization, for that under the uncontradicted evidence introduced at the trial of said action, the said board, in valuing plaintiff's property for taxation, acted in good faith and without fraud.

8. The court erred in its conclusion of law that the use of the percentage of plaintiff's main line track located in the State of Wyoming, of its whole main line track, as a factor in determining the value of plaintiff's property located in the State of Wyoming and subject to valuation by the Wyoming State Board of Equalization constituted and constitutes an arbitrary and unreasonable method and the application of a wholly wrong method and principle of determining the value of plaintiff's property in the State of Wyoming, for that the use of the percentage of plaintiff's main line track located in the State of Wyoming of its whole main line track, as used by the Wyoming State Board of Equalization, was and constituted a legal and proper method and factor in valuing plaintiff's operative property in the State of Wyoming for taxation.

9. The court erred in its conclusion of law "that the use of the percentage of plaintiff's main line track located in the State of Wyoming of its whole main line track, without taking into account the difference in the character, quantity, quality, cost and value of plaintiff's Wyoming property, as compared with its property throughout its system, and the

use of said per centage, as a factor in determining the [fol. 140] value of plaintiff's property located in the State of Wyoming and subject to valuation by the said board, constituted and constitutes an arbitrary and unreasonable method, and the application of a wholly wrong method and principle of determining the value of plaintiff's property in the State of Wyoming," for that the use of the percentage of plaintiff's main line track, as used by the Wyoming State Board of Equalization, was and constituted a legal and proper method and factor in valuing plaintiff's operative property in the State of Wyoming for taxation.

10. The court erred in its conclusion of law wherein it used 1.673% as the allocating factor in allocating to the State of Wyoming the percentage of plaintiff's operative property therein, of its entire system, thus making a valuation amounting to $6,278,534.14 as the actual value of plaintiff's said property in the State of Wyoming, and $1,602,468.90 less than the valuation placed thereon by the Wyoming State Board of Equalization, for that it thus employed and used as an allocating factor a percentage contrary to law.

11. The court erred in its conclusion of law "that the plaintiff's traffic units within the State of Wyoming are 1.58% of the whole; that its rolling stock used in the State of Wyoming is 1.65% of the whole; that its operating revenue in the State of Wyoming is 1.79% of the whole; that the average of these three factors is 1.673%, which, applied to the total valuation of plaintiff's property of $375,285,902, makes a valuation of plaintiff's operating property in the State of Wyoming and subject to valuation by said board, of and amounting to $6,278,534.14, which the court finds to be the true actual value of plaintiff's said property in the State of Wyoming, and which is $1,602,468.90 less than the valuation placed on plaintiff's said property in the State of Wyoming by said State Board of Equalization; "and that plaintiff's said property in the State of Wyoming was substantially and arbitrarily overvalued by the said State Board of Equalization," for that it thus employed and used as an allocating factor a percentage contrary to law.

12. The court erred in its conclusion of law wherein it reduced in any amount the valuation of plaintiff's property

in the several counties for which the defendants are county treasurers, for that the several amounts in which the State Board of Equalization had valued plaintiff's property and [fol. 141] certified the same to the several counties for taxation were not in excess of the true and actual value of plaintiff's property therein for taxation.

13. The court erred in its conclusion of law "that the true actual value of plaintiff's said property in said respective counties in the year 1931 was as follows: Converse County, $1,606,908, Fremont County, $1,733,674, Natrona County, $1,925,177, and Niobrara County, $1,012,766; that the total taxes legally assessable for said year upon the valuations aforesaid in the said respective counties are as follows: Converse County, $31,900.34, Fremont County, $38,417.71, Natrona County, $38,002.48, and Niobrara County, $26,002.40; that the amounts of taxes already paid by the plaintiff at the commencement of this suit in the said respective counties are as follows: Converse County, $24,025.36, Fremont County, $28,933.82, Natrona County, $28,621.09, and Niobrara County, $19,583.40; and that the amounts due to the said respective counties from the plaintiff for 1931 taxes upon the total valuation fixed by the court and allocated to the said respective counties are the following, and no more, to-wit: Converse County, $7,874.98, Fremont Count-, $9,483.89, Natrona County, $9,381.39, and Niobrara County, $6,419.00," for that the several amounts in which the State Board of Equalization had valued plaintiff's property and certified the same to the said counties for taxation were not in excess of the true and actual value of plaintiff's property therein for taxation.

14. The court erred in its conclusion of law as to the remaining amount of taxes to be paid by the plaintiff, for that it refused to allow interest thereon up to the date of the payment thereof.

15. The court erred in its conclusion of law that the plaintiff was entitled to any relief under its Bill in said action, for that its Bill should have been dismissed with costs in favor of the defendants.

16. The court erred in its failure and refusal to find in its findings of fact that plaintiff's operative property in the State of Wyoming was of the same and equal value as

that at which all other property of the same class was valued by the Wyoming State Board of Equalization for taxation for the year 1931, for that the uncontradicted evidence introduced at the trial of said action so shows.

[fol. 142] 17. The court erred in its decree where in it sustained, in part, plaintiff's Bill and reduced the amount of taxes to be paid by plaintiff under the valuation theretofore made by the Wyoming State Board of Equalization and certified to the proper officers of the counties wherein its property is situated.

18. The court erred in its decree in that it failed and refused to dismiss plaintiff's Bill, with costs in favor of said defendants.

19. The court erred in its decree wherein it permanently enjoined defendants from collecting or attempting to collect any sums as taxes for the year 1931 upon the property of the plaintiff as valued by the Wyoming State Board of Equalization for said year and certified to the counties wherein its property is located.

20. The court erred in its decree wherein it reduced the amount of taxes assessed against the plaintiff in the counties in which its property is located and ordered that defendants pay the costs of said action.

21. The court erred in its decree wherein it refused to allow interest on the remaining amount of taxes found to be owing by the plaintiff.

Wherefore, defendants pray that the said decree and order of the court may be reversed; and for such other and further relief as to the court may seem just and proper.

J. A. Greenwood, Attorney General of Wyoming; Richard J. Jackson, Deputy Attorney General of Wyoming; George W. Ferguson, Assistant Attorney General of Wyoming; R. Dwight Wallace, Assistant Attorney General of Wyoming, Attorneys for Defendants.

[fol. 143] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL.—Filed March 13, 1933

This cause coming on now to be heard this 13 day of March, 1933, upon the petition of the defendants for an appeal to the United States Circuit Court of Appeals for the Tenth Circuit, and the court being fully advised, does hereby grant said petition and allow said appeal, and does hereby fix the sum of Five Hundred ($500.00) as the amount of the bond for costs to be given by said defendants on said appeal.

Dated this 13 day of March, 1933.

T. Blake Kennedy, United States District Judge.

RECITAL AS TO BOND

[Cost bond in the sum of $500, approved by the trial judge, with National Surety Company as surety, was filed in the District Court on March 13, 1933.]

RECITAL AS TO CITATION

[Citation in proper form, directed to appellee, with acceptance of service by counsel for said appellee, was filed in the District Court on March 13, 1933.]

IN UNITED STATES DISTRICT COURT

MOTION FOR EXTENSION OF TIME WITHIN WHICH TO DOCKET THE CASE AND FILE TRANSCRIPT.—Filed April 18, 1933

Come Now the above named defendants, by and through their attorneys and solicitors, and respectfully move that this Honorable Court grant an extension of time within which to docket the case and file the record in the above entitled cause on appeal in the United States Circuit Court of Appeals for the Tenth Circuit, to and including the 22nd day of May, A. D. 1933, in order that the clerk of this court may have sufficient time to properly prepare and certify the transcript.

As the cause and necessity for such extension of time, defendants state that because of unavoidable delay in the preparation of the narrative statement of the evidence, such [fol. 144] extension is necessary; wherefore, defendants pray that such extension be granted.

Ray E. Lee, by Oscar O. Natwick, Attorney General of Wyoming; Oscar O. Natwick, Deputy Attorney General of Wyoming; Wm. C. Snow, Assistant Attorney General of Wyoming; J. A. Greenwood, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING EXTENSION OF TIME WITHIN WHICH TO DOCKET AND FILE THE TRANSCRIPT.—Filed April 18, 1933

The matter of the defendants' motion for an extension of time within which to docket the case and file the record in the above entitled cause, on appeal in the United States Circuit Court of Appeals for the Tenth Circuit, coming on for consideration this 18 day of April, A. D. 1933; and it appearing to the court that such extension is necessary for good cause shown, and being fully advised in the premises:

It Is Ordered by the court that the time within which to docket said case and file the record in the United States Circuit Court of Appeals for the Tenth Circuit be, and it is hereby enlarged and extended to and including the 22nd day of May, A. D. 1933.

Dated this 18 day of April, A. D. 1933.

T. Blake Kennedy, Judge.

IN UNITED STATES DISTRICT COURT

NOTICE OF LODGMENT—Filed March 13, 1933

To the Plaintiff, Chicago & North Western Railway Company, a Corporation, and to Its Solicitors:

You and each of you will take notice that the defendants, Thomas C. Rowley, as treasurer of Converse County, State of Wyoming; Charles M. Hall, as treasurer of Fremont County, State of Wyoming; Alta Pearl Massee, as treasurer of Natrona County, State of Wyoming; D. A. Shoop-

[fol. 145] man, as treasurer of Niobrara County, State of Wyoming, pursuant to Federal Equity Rule No. 75 (b), have lodged in the office of the clerk of said court for your examination, the condensed statement of the evidence taken on the trial of said cause, and that the said defendants on the 24th day of March, 1933, at ten o'clock A. M. on said day, or as soon thereafter as the same can be heard, will ask the Judge of said court to approve the said statement.

J. A. Greenwood, Attorney General; Richard J. Jackson, Deputy Attorney General; Solicitors and of Counsel for Defendants.

Service of the above notice by copy is acknowledged this 13th day of March, 1933. R. R. Rose, Solicitor and of counsel for Chicago & North Western Railway Company, Plaintiff.

In United States District Court

Request for Leavl to Substitute Charles M. Hall as a Defendant in the Place of and for the Defendant, Charles T. Cole—Filed March 7, 1933

Come Now the defendants and show to the court that since the commencement of this action and during its progress, Charles M. Hall has become treasurer of the County of Fremont, State of Wyoming, as successor to the defendant, Charles T. Cole, and defendants pray that they may substitute the said Charles M. Hall as a defendant in the place of and for the said defendant, Charles T. Cole.

Thomas C. Rowley, Treasurer, Converse County, Wyoming; Charles T. Cole, Treasurer, Fremont County, Wyoming; Alta Pearl Massee, Treasurer, Natrona County, Wyoming; D. A. Shoopman, Treasurer, Niobrara County, Wyoming; by J. A. Greenwood, Attorney General of Wyoming, and Counsel for said Defendants.

[fol. 146] In United States District Court

Order Permitting Defendants to Substitute Charles M. Hall as a Defendant for and in the Place of the Defendant, Charles T. Cole—Filed March 7, 1933

Come Now the defendants and file their application for leave to make Charles M. Hall a party defendant for and

in the place of Charles T. Cole, defendant, as the successor in office of the said Charles T. Cole.

And the Court Being Sufficiently Advised, does now give leave to defendants to substitute the said Charles M. Hall as a party defendant for and in the place of the said Charles T. Cole—the said action to be hereafter entitled in the name of the said Charles M. Hall as one of the defendants therein.

Dated this 7 day of March, 1933.

T. Blake Kennedy, United States District Judge.

In United States District Court

Election as to Printing Transcript—Filed April 24, 1933

Come Now the appellants herein and waives the printing of the record in the above case by the clerk of the District Court of the United States for the District of Wyoming, and elects that the same be printed by the United States Circuit Court of Appeals for the Tenth Circuit.

Ray E. Lee, J. A. Greenwood, Attorneys for Appellants.

In United States District Court

Præcipe for Transcript—Filed April 24, 1933

To Charles J. Ohnhaus, Clerk of the District Court of the United States for the District of Wyoming:

You Are Hereby Requested to prepare a transcript on appeal in the above entitled case and to include therein the following portions of the record, to-wit:

1. Bill in equity, filed November 7th, 1931.

[fol. 147] 1a. Temporary Restraining order, November 7th, 1931.

1b. Temporary Injunction order, December 28th, 1931.

2. Answer of the defendants, filed January 7th, 1932.

2a. Judge's Memorandum, filed August 30, 1932.

3. Judge's memorandum, filed November 9th, 1932.

4. Findings of fact and conclusions of law and Decree, entered December 17th, 1932.

5. Statement of the evidence, including certificate of approval of statement of evidence, filed April 24th, 1933.
6. Petition for appeal, filed March 13th, 1933.
7. Assignments of error, filed March 13th, 1933.
8. Order allowing appeal, filed March 13th, 1933.
9. Cost bond on appeal, filed March 13th, 1933.
10. Citation to appellees, filed March 13th, 1933.
11. Motion for extension of time within which to docket case and file transcript, filed April 18th, 1933.
12. Order allowing extension of time within which to docket case and file transcript, entered April 18th, 1933.
13. Notice to the plaintiff of the lodging of the condensed statement of the evidence, filed March 13th, 1933.
14. Request for leave to substitute Charles M. Hall as defendant in the place of and for the defendant Charles T. Cole, filed March 7th, 1933.
15. Order substituting Charles M. Hall as defendant in the place of and for the defendant Charles T. Cole, filed March 7th, 1933.
16. Election as to printing of transcript, filed April 24th, 1933.
17. Præcipe for transcript, filed April 24th, 1933.
18. Stipulation for transcript, filed April 24th, 1933.

Ray E. Lee, Attorney General of Wyoming; James A. Greenwood, Attorneys for Appellants.

[fol. 148] Service of the attached præcipe for transcript by copy is acknowledged this 22nd day of April, A. D. 1933.

R. R. Rose, Vincent Mulvaney, Wilfrid O'Leary, Attorneys for Appellee.

IN UNITED STATES DISTRICT COURT

STIPULATION FOR TRANSCRIPT OF RECORD—Filed April 24, 1933

It Is Hereby Stipulated and Agreed by and on behalf of the above named plaintiff and defendants, by and through their attorneys of record in said cause, that the following portions of the record, as filed in the office of the clerk of the above court, be included in the transcript:

1. Bill of Equity, filed November 7th, 1931.

1a. Temporary Restraining order, November 7th, 1931.

1b. Temporary Injunction order, December 28th, 1931.

2. Answer of the defendants, filed January 7th, 1932.

2a. Judge's Memorandum, filed August 30, 1932.

3. Judge's Memorandum, filed November 9th, 1932.

4. Findings of fact and conclusions of law and Decree, entered December 17th, 1932.

5. Statement of the evidence, including certificate of approval of statement of evidence, filed April 24th, 1933.

6. Petition for appeal, filed March 13th, 1933.

7. Assignments of error, filed March 13th, 1933.

8. Order allowing appeal, filed March 13th, 1933.

9. Cost bond on appeal, filed March 13th, 1933.

10. Citation to appellees, filed March 13th, 1933.

11. Motion for extension of time within which to docket case and file transcript, filed April 18th, 1933.

12. Order allowing extension of time within which to docket case and file transcript, entered April 18th, 1933.

[fols. 149 & 150] 13. Notice to the plaintiff of the lodging of the condensed statement of the evidence, filed March 13th, 1933.

14. Request for leave to substitute Charles M. Hall as defendant in the place of and for the defendant Charles T. Cole, filed March 7th, 1933.

15. Order substituting Charles M. Hall as defendant in the place of and for the defendant Charles T. Cole, filed March 7th, 1933.

16. Election as to printing of transcript, filed April 24th, 1933.

17. Præcipe for transcript, filed April 24th, 1933.

18. Stipulation for transcript, filed April 24th, 1933.

R. R. Rose, Vincent Mulvaney, Wilfrid O'Leary, Attorneys for Plaintiff. Ray E. Lee, Attorney General of Wyoming; James A. Greenwood, Attorneys for Defendants.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER OF SUBMISSION—Sept. 25, 1933

Before Honorable Orie L. Phillips, Circuit Judge; Honorable Sam G. Bratton, Circuit Judge, and Honorable J. Foster Symes, District Judge

This cause came on to be heard and was argued by counsel, James A. Greenwood, Esquire, appearing for appellants, Robert R. Rose, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS, JANUARY TERM, 1934

No. 881

James A. Greenwood (Ray E. Lee, Attorney General of the State of Wyoming, John J. McIntyre, H. S. Harnsberger, George A. Weedell, Harold I. Bacheller, Thomas O. Miller were with him on the brief) for Appellants.

R. R. Rose (W. T. Faricy, Vincent Mulvaney and Wilfred O'Leary were with him on the brief) for Appellee.

Before Phillips and Bratton, Circuit Judges, and Symes, District Judge

OPINION—January 9, 1934

BRATTON, Circuit Judge, delivered the opinion of the court:

The Chicago and North Western Railway Company, a corporation organized under the laws of the State of Illinois, hereinafter called plaintiff, instituted this action against the respective treasurers of Converse, Freemont, Natrona and Niobrara Counties in Wyoming, hereinafter called defendants, to enjoin them from collecting the full amount of tax levied against its property for the year 1931.

Plaintiff alleged that it submitted a return of its property, subject to tax, containing the information required by [fol. 152] law; that thereafter the State Board of Equali-

zation of Wyoming fixed the value of the property at $7,881,003.94; that such sum was $2,031,433.94 in excess of the actual value of such property; that for more than ten years preceding the institution of the suit, its property throughout the state had been intentionally and systematically valued much higher than property of other taxpayers; that during such period about twenty per cent of the property throughout the state properly subject to tax had been omitted from the tax rolls, and that in consequence of such action plaintiff suffers a discrimination in violation of its rights under the Fourteenth Amendment to the Constitution of the United States, guaranteeing equal protection of the laws. It charged that the tax asserted by the four counties, computed on their respective allocations of such excessive valuation, is: Converse, $40,042.27; Fremont, $48,223.02; Natrona, $47,701.82; Niobrara, $32,639.01; that based upon a valuation uniform with that placed on property throughout the state, the tax due such counties would be: Converse, $24,025.37; Fremont, $28,933.81; Natrona, $28,621.09; Niobrara, $19,583.41; that it had tendered the counties one-half of the respective sums properly due and payable; that it stood ready and willing to pay such other amounts, if any, as and when the court should determine the same to be due and payable, and that unless prevented from doing so, the defendants would restrain and sell its property for the taxes thus illegally imposed.

Defendants challenged the jurisdiction of the court; they denied excessive valuation of plaintiff's property; they asserted that it was valued more than $4,000,000.00 under its actual value, and they denied the alleged discrimination.

Judgment was rendered, reducing the value of the property by $1,602,468.90; the tax was computed on the corrected value; the apportionment was made to the four counties, and defendants were enjoined from enforcing collection of any tax in excess of the amount thus determined to be due.

The first question presented for our consideration relates to the jurisdiction of the district court to grant equitable relief. It is asserted that under relevant statutes of the state (quoted in note 1) a plain and adequate remedy at law is provided. The remedy is to pay the tax, submit to the Board of County Commissioners an application for its

[fol. 153] refund and if that is denied, institute a suit in the district court for its recovery. Recourse to equity cannot be had if there is a plain, adequate, complete and efficient remedy at law. Sec. 384, Title 28, U. S. C. A. Decisions so holding are without number.

The mere illegality of a tax is not sufficient to invoke the aid of a court of equity. In addition to that fact, there must be lack of a plain, adequate, complete and efficient remedy at law. In order to be plain, adequate, complete and efficient, the remedy, by its nature and character, must be adapted and suited to the accomplishment of the end in view. The remedy is not adequate and complete if several suits would be required between the same parties involving identical issues of fact and law. In other words, equity may intervene where a multiplicity of suits at law would be necessary to determine the controversy and to accord parties the rights to which they are entitled. Obviously, four separate actions would be required here, one against the treasurer of each county. The issues of fact and law would be identical, but it is not improbable that different conclusions would be reached, thus injecting uncertainty, confusion and delay into the situation. For that reason, the remedy at law is not adequate, complete and efficient.

While federal courts should maintain a proper reluctance to interfere through use of the writ of injunction or otherwise, with a sovereign state in the collection of its revenues, guided by the considerations enunciated in the settled adjudications in respect of the question, the trial court correctly entertained equitable jurisdiction. Union Pacific R. Co. v. Board of County Commissioners, 247 U. S. 282; Wilson v. Ill. Southern Ry. Co., 263 U. S. 574; Chicago, G. W. Ry. Co. v. Kendall, 266 U. S. 94; Pleasant v. M. K. & T. R. Co., (C. C. A. 10) 66 F. (2d) 842; Roadway Express, Inc. v. Murray, 60 F. (2d) 293; A. T. & S. F. Ry. Co. v. Sullivan, (C. C. A. 8) 173 F. 456.

The case of Matthews v. Rodgers, 284 U. S. 521, upon which defendants strongly rely, is not to the contrary. Plaintiffs there sued for themselves and others similarly situated to restrain the collection of a tax alleged to be void in that it imposed an unconstitutional burden on interstate commerce. It was held that the bill failed to state a cause of action cognizable in equity because as to each

party a single suit brought at law to recover the tax would determine the constitutionality of such tax; that no facts were alleged showing the necessity for more than one suit; [fol. 154] that the alleged unconstitutionality of the law depended upon its application to each of the appellees attended by different business conditions, and in that way presented separate issues of fact and law. The situation is different here. There is an identity of issues, both fact and law. They can be determined in one equitable proceeding, while, as previously suggested, at least four different actions at law would be required with possible divergence of conclusions. Stratton v. St. L. S. W. R. Co., 284 U. S. 530, also stressed by defendants, unlike this case, did not necessitate a multiplicity of suits to recover the tax involved.

We turn now to the other question involved. Plaintiff operates a railway system in the States of Illinois, Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, Wisconsin and Wyoming. In fixing the taxable value of property in Wyoming, the State Board of Equalization considered and used four factors, namely: traffic units, 1.58 per cent; rolling stock, 1.65 per cent; operating revenue, a composite figure between gross and net, 1.89 per cent—admittedly erroneous, the correct figure concededly being 1.79 per cent—and track mileage, 3.29 per cent. Each factor represented the proportion the part in Wyoming bore to the entire system. These sums were added, the total divided by four and that average was the measure finally adopted. The parties agree that the first three factors are correct. No dispute arises from their use. The controversy relates to the fourth. The first three total 5.02 per cent, and their average is 1.673 per cent. Their use, with the fourth eliminated, would result in a valuation of $6,278,534.14. The same method of computation, including the fourth, resulted in valuating the property at $7,881,003.94, thus making a difference of $1,602,468.90.

The court found that the railroad system embraces 8,180.20 miles of main line track of which 278.35 miles are located in Wyoming; but the quality, cost and value of such property within that state, measured by main line track, is greatly less than that throughout the system. That finding is sustained by substantial evidence. Conditions through-

out the system are not substantially uniform. They differ widely. The company owns costly grade separations in Chicago, generally known as track elevations raising the main line grade twelve or fifteen feet above the street level to permit traffic in the streets without interruption. There [fol. 155] are no such elevations in Wyoming. It has stone ballast in other states. There is none in Wyoming. Its bridges in some of the other states are of the expensive stone or stone arch type, while most of those in Wyoming are temporary in character, called pile trestles. Its station facilities in other states, particularly in Illinois, are extensive in capacity and expensive in character. Except for three or four, those in Wyoming are of temporary construction, some being car bodies and platforms. With a few exceptions, the rails used for yard and side track purposes in Wyoming are substantially lighter in weight, and consequently less in value, than those used in other states, notably Illinois, Wisconsin and Iowa. These differences are substantial. There is lack of uniformity in conditions throughout the system.

The so-called track mileage method of fixing value of railroad property for tax purposes, that is to say, ascertaining and fixing the figure which bears the same ratio to the value of the entire system that the miles of track in the state bear to the total mileage of the system, both within and without the state, is an approved method where conditions are fairly uniform throughout the system. State Railroad Tax Cases, 92 U. S. 575; Cleveland etc. Railway Co. v. Backus, 154 U. S. 439; American Refrigerator Transit Co. v. Hall, 174 U. S. 70; A. T. & S. F. Ry. Co. v. Sullivan, supra. But that method is obviously arbitrary and unreasonable and cannot be sustained if conditions within and without the state vary substantially or differ widely. Its application in such circumstances results in taxing property outside the state under a mere pretense. Pittsburgh etc. Railway Co. v. Backus, 154 U. S. 521; Western Union Telegraph Co. v. Taggart, 163 U. S.; Fargo v. Hart, 193 U. S. 490; Wallace v. Hines, 253 U. S. 66.

In view of the court's finding that the parts of the system within and without the state are not fairly uniform, but differ widely, and that finding being supported by substantial and virtually uncontroverted testimony, the use

of the track mileage factor, without making allowance for such differences, was an arbitrary and unreasonable method in fixing the value of the property within the state. It not merely effected an excessive value with a consequent injustice; its effect was to tax property without the state. It amounted to fraud in law, although members of [fol. 156] the Board of Equalization acted without fraudulent or other improper motive. That cannot be upheld. Defendants undertake to sustain the assessment with the argument that the other factors were proper. That fact cannot save them, because it merely reduces the quantum of vice. It still exists. It is plain and by mathematical calculation it can be determined that its presence increased the value placed on plaintiff's property $1,602,468.90. The court correctly reduced the value by that amount, computed the tax on the corrected sum, made the apportionment thereof to the four counties and restrained the collection of any sum in excess of that amount. Accordingly the judgment is affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION

SYMES, District Judge (dissenting):

I regret I am unable to agree with the court on the one question of jurisdiction. The bill of complaint simply discloses a dispute as to the proper method of arriving at the value of plaintiff's property. The most that can be said is that the method adopted by the State Board of Equalization was illegal. True, fraud and systematic undervaluation of other classes of property are charged, but are [fol. 157] wholly unsupported by the evidence, and were properly found to be without merit. No facts are shown to support the conclusion pleaded, that no plain, speedy, or adequate remedy at law exists, or that great and irreparable loss will be suffered. It is not alleged that plaintiff has tested or exhausted the legal remedies available under the state statutes, or that a multiplicity of suits are probable or possible.

NOTE 1.—"Actions to enjoin the illegal levy of taxes and assessments must be brought against the corporation or person for whose use and benefit the levy is made; and if the levy would go upon the tax list, the county treasurer

must be joined in the action." Sec. 89-4202. Revised Statutes, 1931.

"Actions to enjoin the collection of taxes and assessments must be brought against the officer whose duty it is to collect the same; actions to recover back taxes and assessments must be brought against the officers who made the collection, or, if he is dead, against his personal representative; and when they were not collected on the tax list, the corporation which made the levy must be joined in the action; provided, that when the money derived from said taxes or assessments has been actually paid over to any county or municipal corporation for whose use and benefit it was levied or collected, then an action shall be brought against said county or municipal corporation to recover said taxes or assessments." Sec. 89-4203.

"In all cases where any person shall pay any tax, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to clerical errors or other errors, the board of county commissioners shall direct the treasurer to refund the same to the taxpayer, or, in case any real property subject to taxation shall be sold for the payment of such erroneous tax, the error in tax may at any time be corrected as above provided, and shall not affect the validity of the sale, but such property shall be redeemed by the county as hereinafter set forth." Sec. 115-311.

"District courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof; but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected." Sec. 89-4201.

Two recent cases in the U. S. Supreme Court, Matthews v. Rodgers, 284 U. S. 521, and Stratton v. St. Louis Southwestern Railway Co., 284 U. S. 530, are decisive. In the former Justice Stone says:

"The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted fed-

eral right may be preserved without it. Whenever the question has been presented, this court has uniformly held that the mere illegality or unconst-utionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States."

And further, that if there is an adequate remedy at law, it must be pursued. He then examines the law of the state involved (Mississippi), and finds that there is a plain remedy afforded by the applicable statutes of the state.

The Stratton case, supra, (coming up from Illinois), involves the same question. The court finds the existence of a right to recover the tax if illegal or inequitable, and refuses relief, saying, p. 534:

"There being a legal remedy for the recovery of the tax, no case is made for invoking the jurisdiction of equity to enjoin collection of it in the absence of allegations setting up special circumstances which would render the legal remedy inadequate."

These very late cases show the tendency of that court to narrow the grounds of Federal jurisdiction in cases of this nature.

Sec. 115-311, Rev. Stats. Wyo., 1931, makes it the duty of the county commissioners to direct the treasurer to refund erroneous or illegal taxes without suit, and § 89-4201, Rev. [fol. 158] Stats. Wyo., 1931, gives the aggrieved taxpayer a right of action to enjoin an illegal levy or assessment, or to recover back taxes wrongfully exacted or paid. As simple a method as could be asked. See Carton v. Board of Commissioners, 69 Pac. 1013. The good faith of the state officers will be presumed. Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350. So we have a situation where the most that can be contended by the railroad is that the Board of Equalization made an honest mistake in valuing the plaintiff's property. This does not amount to discrimination. Sunday Lake Iron Co. v. Wakefield, supra.

Among the cases cited by appellee is Union Pacific R. R. Co. v. Weld County, 247 U. S. 282. Justice Van Devanter wrote the opinion in that case and in Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481. Both arose in Colorado. In the earlier case, Singer Sewing Mach. Co. v Benedict, supra, he observeed that the revenue laws of Colorado con-

tained a section imposing upon the county commissioners in all cases the duty of refunding to the taxpayer without abatement or discount, any tax interest or costs or any portion thereof, which is found to be erroneous or illegal, and that this by necessary implication, confers upon the taxpayer a correlative and substantive right to have the same so refunded. That this constituted an adequate remedy at law, and therefore relief by injunction was not admissible. Later, when Union Pacific R. R. Co. v. Weld County, supra, came up to the Supreme Court, he found a new statute, the effect of which had not yet been determined by the state Supreme Court, and which might be construed as prohibiting the commissioners from refunding illegal taxes without the approval of the state tax commission, and as withdrawing the right of action referred to; that therefore, the existence of an adequate remedy at law was uncertain and debatable, and equitable jurisdiction and an injunction could not be properly declined.

When we consider the similar Wyoming statute, the simple and complete remedy it affords, and the decisions of the state court, it would seem the Singer Sewing Mach. Co. case, supra, and not the Union Pacific Co. case, supra, is the authority applicable to the facts here. The distinction is clearly pointed out in Greene v. Louisville & I. R. R. Co., 244 U. S. 499, at p. 519.

Sec. 384, Tit. 28, U. S. C. A. (Rev. Stats. 723), forbids [fol. 159] suits in equity, where a plain, adequate and complete remedy exists at law. Justice Stone in Matthews v. Rodgers, supra, says this applies with peculiar force to suits in the Federal court to enjoin collection of a state tax. Admittedly, the only possible ground for plaintiff coming here in the fear that it will have to bring a separate suit against each of the four counties involved.

Pacific Exp. Co. v. Seibert, 44 Fed. 310 (an old case in the Western Dist. of Missouri), affirmed 142 U. S. 339, involved a state tax alleged to violate the Federal Constitution. A penalty of $100.00 a day for each day's delay in payment was provided, recoverable in separate actions. Judge Caldwell, speaking for himself and Judge Phillips, said:

"A very clear case must be made out before a federal court will enjoin the collection of a state tax * * * It must also appear that its collection will be attended with a

multiplicity of suits, or the destruction of a franchise, or cast a cloud upon the title to real estate, or some other recognized head of equity jurisdiction must be shown."

And in speaking of a multiplicity of suits, he said, p. 315:

"It is real and not imaginary suits, it is probable and not possible danger of multiplicity of suits, that will warrant the assumption of jurisdiction on that ground. While it is true, as the plaintiff contends, that the state might bring a separate suit for each day's penalty, the court would hardly be justified in acting on the assumption that it would do so. The state is not to be looked upon in the light of a barrator, and the court will not impute to it, or to its officers acting for and in its name, a litigious or vindictive spirit, or a purpose needlessly to vex and harass the citizen with lawsuits * * * and, until the fact is shown to be otherwise, will act on the assumption that a state will not bring any more suits than are fairly necessary to establish and maintain its rights."

In Equitable Guarantee & Trust Co. v. Donahue, 45 Atl. 583, the chancery court of Delaware, under a state statute similar to the Federal statute, supra, had our question before it. The chancellor, after discussing the origin of this branch of equity jurisdiction, says:

[fol. 160] "is there imminent and threatened a multiplicity of suits of such a nature and between such parties as to satisfy the court that the legal remedies are not sufficient?"

And approves the quotation from the Pacific Exp. Co. case, supra.

In an old case in Massachusetts, Fellows v. Spaulding, 6 N. E. 548, the court was urged to take jurisdiction to prevent a multiplicity of suits, in each of which the same question of law would be present, but declined, saying there is no reason why one suit, the others being continued to abide the result, should not settle all the cases.

In Boise Artesian Hot and Cold Water Co. v. Boise City, 213 U. S. 276, the Supreme Court says it has refrained from interfering in all cases where the Federal rights of the per-

sons could be preserved unimpaired, and discussing the question of multiplicity of suits says, p. 286:

"Where the multiplicity of suits to be feared consists in repetitions of suits by the same person against the plaintiff for causes of action arising out of the same facts and legal principles, a court of equity ought not to interfere upon that ground unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation."

And:

"Perhaps it might be necessary to await the final decision of one action at law." Citing cases.

And Corpus Juris, Vol. 21, p. 74, says:

"While the prevention of a multiplicity of suits is an independent and substantive ground of equity jurisdiction and not merely a makeweight where other equities are present, it does not alone create a cause of action where none otherwise exists;"

The subject is also discussed by Pomeroy, 4th Ed., Vol. 1, beginning at § 243.

In Wilson v. Ill. So. Ry., 263 U. S. 574 (also cited by appellee), Federal jurisdiction was sustained, not only because a multiplicity of suits against the taxing bodies would result,

[fol. 161] "but there would be insuperable difficulty in determining what the proper assessment against the whole road should be and in apportioning the due share to the county concerned. This difficulty would recur in each of the five counties with not improbably different results in each."

Therefore there was no adequate remedy at law.

In the case at bar no such allegations are made, and, as pointed out, the assessment is fixed by one body; there is authority to repay the tax, if illegal, without a suit, which we assume the proper officials would do. In addition the taxpayer has a right of action to enjoin or recover.

Keokuk Bridge Co. v. Salm, 258 U. S. 122, was a suit by a private property holder, and the only question was overvaluation. The Supreme Court denied jurisdiction because

the remedy afforded by the state statute had not been availed of.

The authorities are of course too numerous to mention. In all, the Supreme Court after observing it is only in extreme cases that the Federal court will enjoin the collection of a state tax, proceeds to inquire whether, under the remedy afforded the aggrieved taxpayer, the question can be clearly presented and speedily determined, either in a court of law by an administrative body, or both. If it can jurisdiction is declined. The mere fact that there may be a possibility, as distinguished from a probability of more than one action being required, does not alter the rule.

Following appellee's argument to its logical conclusion, appellee could have its tax controversies passed upon by the Federal court merely because its railroad ran through four counties in Wyoming, while another railroad with the same grievance, whose line traversed only one county of the same state would be denied Federal jurisdiction. Federal jurisdiction does not depend upon any such fortuitous circumstance.

The method of valuation adopted was illegal and should be condemned. I doubt, however, the right of the court to determine the method to be followed in arriving at a valuation, or in actually fixing the figure. This is an administrative and not a judicial function. The constitution of Wyoming, Art. 15, § 11, provides, that all property, except as in this constitution otherwise provided, shall be uni- [fol. 162] formly assessed for taxation, and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property real and personal and, admittedly, an honest but mistaken effort to do this was made. It is still the duty of the board to make the valuation and, according to the authorities, they can use the rejected mileage basis as a factor, if proper allowance is made for the difference in value between a mile of track in Wyoming, and that of other parts of the system; or the board may adopt a method other than that adopted by the lower court, provided it secures a just valuation.

Pleasant et al. v. Missouri-Kansas-Texas R. Co., 66 Fed. (2d) 842 (C. C. A. 10th), was a suit to enjoin collection of state taxes. It was held that courts do not supervise the actions of assessing bodies, or sit to correct their errors of judgment.

The State Railroad Tax Cases, 92 U. S. 575, is a leading case. Justice Miller there says that while they do not lay down any absolute limitation of the power of a court of equity to restrain the collection of illegal taxes; that if the grievance can be remedied by a suit at law, either before or after the payment of taxes, a court of equity will not interpose by injunction to stay collection of the tax (p. 614); and goes on to say that the court has no power to apportion the tax, to make another assessment, or to direct another to be made by the proper officers; that these officers, and the manner in which they exercise their functions, are wholly beyond the power of the court. And further on: that while a court of equity may enjoin a tax complained of in whole or in part, it has not the power of doing complete justice by making, or causing to be made a new assessment on any principle it may decide to be the right one.

See also Ex parte State of Oklahoma, 37 Fed. (2d) 862 (C. C. A. 10th).

It would therefore seem that under the rule of the Stratton case, supra, no special circumstances are shown that render the legal remedy inadequate.

December 28, 1933.

[fol. 163] In United States Circuit Court of Appeals

Decree—Jan. 9, 1934

Before Honorable Robert E. Lewis, Honorable Orie L. Phillips and Honorable George T. McDermott, Circuit Judges

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Wyoming and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court, in this cause be, and the same is hereby, affirmed, and that Chicago and North Western Railway Company, a corporation, appellee, have and recover of and from Thomas C. Rowley, as Treasurer of Converse County, State of Wyoming; Charles M. Hall, as Treasurer of Fremont County, State of Wyoming; Alta Pearl Massee, as Treasurer of Natrona County, State of Wyoming; and D. A. Shoopman, Treasurer of Niobrara County, State of Wyoming, appellants, its costs herein.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR REHEARING—Filed Feb. 7, 1934

Come Now the above-named appellants, Thomas C. Rowley, as Treasurer of Converse County, State of Wyoming; Charles M. Hall, as Treasurer of Fremont County, State of Wyoming; Alta Pearl Massee, as Treasurer of Natrona County, State of Wyoming; and D. A. Shoopman, as Treasurer of Niobrara County, State of Wyoming, and present this, their petition for a rehearing of the above-entitled cause, and most respectfully state that this Honorable Court erred in its decree herein, dated January 9th, 1934, wherein and to the extent that it affirmed the judgment of the lower court of November 9th, 1932, and as grounds for such error here complained of, respectfully show:

1. That the Federal District Court did not have equitable jurisdiction of this cause.

2. That the pleadings and facts do not warrant the granting of injunctive relief herein.

[fol. 164] 3. That the evidence is not sufficient to justify the granting of any equitable relief.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the lower court be reversed.

Respectfully submitted, Ray E. Lee, Attorney General of the State of Wyoming; John J. McIntyre, County and Prosecuting Attorney, Douglas, Converse County, Wyoming; H. S. Harnsberger, County and Prosecuting Attorney, Lander, Fremont County, Wyoming; George A. Weedell, County and Prosecuting Attorney, Casper, Natrona County, Wyoming; Harold I. Bacheller, Deputy County and Prosecuting Attorney, Casper, Natrona County, Wyoming; Thomas O. Miller, County and Prosecuting Attorney, Lusk, Niobrara County, Wyoming, Attorneys for Appellants. James A. Greenwood, Cheyenne, Wyoming, Special Counsel for Appellants.

Certificate of counsel omitted in printing.

[fol. 165] [File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—Feb. 23, 1934

This cause came on to be heard on the petition of appellants for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

[fol. 166] IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION FOR STAY OF MANDATE—Filed Feb. 28, 1934

Come now the above-named appellants, Thomas C. Rowley, Treasurer of Converse County, State of Wyoming; Charles M. Hall, Treasurer of Fremont County, State of Wyoming; Alta Pearl Massee, Treasurer of Natrona County, State of Wyoming; and D. A. Shoopman, Treasurer of Niobrara County, State of Wyoming, and move the court for a stay of mandate, or other process therein, for a period of thirty (30) days in order to afford time to said appellants to prepare and present their application for a writ of certiorari in said cause to the Supreme Court of the United States.

And appellants hereby certify that the foregoing motion for stay in mandate is presented in good faith.

Ray E. Lee, Attorney General of the State of Wyoming; John J. McIntyre, County and Prosecuting Attorney, Douglas, Converse County, Wyoming; H. S. Harnsberger, County and Prosecuting Attorney, Lander, Fremont County, Wyoming; George A. Weedell, County and Prosecuting Attorney, Casper, Natrona County, Wyoming; Harold I. Bacheller, Deputy County and Prosecuting Attorney, Casper, Natrona County, Wyoming; Thomas O. Miller, County and Prosecuting Attorney, Lusk, Niobrara County, Wyoming, Attorneys for Appellants. James A. Greenwood, Cheyenne, Wyoming, Special Counsel for Appellants.

[File endorsement omitted.]

[fols. 167 & 168] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—Feb. 28, 1934

This cause came on to be heard on the motion of appellants for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 169] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 30, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,495. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 9. Thomas C. Rowley, as Treasurer of Converse County, State of Wyoming, et al., etc., Petitioners, vs. Chicago and Northwestern Railway Company. Petition for a writ of certiorari and exhibit thereto. Filed March 24, 1934. File No. 9, O. T., 1934.